Supreme Court, U.S.
FILED

No. _____ 091199 MAR 30 2010

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In The

Supreme Court of the United States

SYLVIA BAPTE, et al.,

Petitioners,

vs.

WEST CARIBBEAN AIRWAYS, NEWVAC CORPORATION, GO 2 GALAXY, INC., JACQUES CIMETIER, and ASEGURADORA COLSEGUROS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The 1999 Montreal Convention is an international treaty that has been ratified by the United States. It amended important provisions of the Warsaw Convention concerning compensation for the victims of air disasters while maintaining the core provisions which have successfully served the international air transport community for several decades (i.e. the "Warsaw System"). The Montreal Convention modernized a number of key areas. The inclusion of the procedural device of *forum non conveniens* was not one of the modernizations adopted by the member states at the 1999 Montreal Convention when it was specifically rejected. The jurisdictional provisions of the Montreal Convention allow Plaintiffs to select where to file their actions. Petitioners in the instant are French citizens of Martinique who brought suit against Respondent Newvac in a District Court in Florida (where Newvac's home offices are located) following an air disaster. To avoid an American jury, Respondent Newvac moved to dismiss the case to Martinique on *forum non conveniens* grounds and offered to confess to liability and pay reduced damages in Martinique under French law if a *forum non conveniens* dismissal was granted. Over objection, the District Court accepted Newvac's confession of liability and then performed an incomplete *forum non conveniens* analysis only as to the remaining damage issues in the case which resulted in the dismissal of the action to Martinique. The questions presented here are:

QUESTIONS PRESENTED – Continued

1. Did the District Court err in applying *forum non conveniens* to the Montreal Convention claims brought by Petitioners when Petitioners are given the express right to select jurisdiction under the treaty?

2. Did the District Court err in allowing Newvac to confess to liability only to then apply a *forum non conveniens* venue analysis, limited only to damage claims, which resulted in dismissal to Martinique?

LIST OF PARTIES

Petitioners:

Petitioners are the representatives of 102 of the 152 passengers who perished in the crash of Flight 708 on August 16, 2005. Each Petitioner is a natural person and resident of the Republic of France, Department of Martinique. The List of Parties are contained in a separate letter filed with the Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The decision below is reported at *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (2009), *reh'g denied*, and is reprinted in the appendix at App. 1.

BASIS FOR JURISDICTION IN THIS COURT

Petitioners invoke certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1).

The Eleventh Circuit Court of Appeals entered its opinion on October 8, 2009, and then denied rehearing on December 30, 2009. This petition is timely filed within 90 days of December 30, 2009.

The Eleventh Circuit Court of Appeals' decision conflicts with *Hosaka v. United Airlines,* 305 F.3d 989 (9th Cir. 2002) as it pertains to application of the doctrine of *forum non conveniens* to claims brought under the Montreal Convention. There is also conflict with *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S.Ct. 1184 (2007) and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) as it pertains to when *forum non conveniens* can be applied

during a lawsuit. Certiorari jurisdiction exists to determine whether the Eleventh Circuit Court of Appeal's decision departed from the foregoing. *Pure Oil Co. v. Suarez*, 384 U.S. 202, 86 S.Ct. 1394 (1966); and *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968) (conflict with a decision of United States Supreme Court) and *U.S. v. Giordano*, 94 S.Ct. 1820 (1974) and *U.S. v. Chavez*, 94 S.Ct. 1849 (1974) (conflict between circuits).

TREATIES AND STATUTES INVOLVED

The Convention For The Unification Of Certain Rules For International Carriage By Air (the "1999 Montreal Convention"):

> Article 33 – Jurisdiction
>
> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
>
> * * *
>
> 4. Questions of procedure shall be governed by the law of the court seised of the case.

The Convention For The Verification Of Certain Rules Relating To International Carriage By Air (the "1929 Warsaw Convention"):

> Article 28
>
> (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the court seised of the case.

STATEMENT OF THE CASE

Respondent Newvac is a Florida corporation whose offices are located in Dania Beach, Florida. Petitioners maintain in this appeal and below that Newvac is a "clandestine airline," which is a label given to unauthorized U.S. entities that compete with legitimate U.S. air carriers by chartering cheaper foreign aircraft with less stringent safety standards. Below, discovery revealed that Newvac, while licensed only as a tour guide, was the *de facto* operator of a Colombian airline, West Caribbean Airline ("WCA"), and that Newvac provided to WCA administrative

support, personnel, landing fees, fuel, airline control fees, baggage handling fees, pilot training, set routes, set schedules, and provided spare parts – all while avoiding FAA licensing and safety regulations – and doing so from within Newvac's offices in South Florida.

On August 16, 2005, and under charter to Newvac, WCA Flight 708 crashed in Venezuela while carrying 152 passengers and an 8-member crew aboard an overworked MD-80 aircraft which had been cobbled together with a sundry of spare parts. All aboard perished. These consolidated actions ensued in the District Court for the Southern District of Florida pursuant to the 1999 Montreal Convention. Petitioners alleged that the American corporation Newvac was essentially operating the Colombian airline WCA and was therefore legally responsible for the crash as the "contracting carrier" under the Montreal Convention. Newvac initially denied liability. When discovery began to reveal otherwise, and when the chance of facing a jury increased, Florida based Newvac filed an Affidavit attesting that the French Court in Martinique was not only available and adequate, but that Newvac would concede liability and waive damage limits *if* the District Court dismissed the case on *forum non conveniens* grounds to Martinique where reduced damages would be awarded under French law. Petitioners never so agreed. Five days later, the District Court entered a preliminary Order determining that Newvac was indeed a "contracting carrier" under the Montreal Convention, rendering it

liable for Petitioners' damages. The District Court, also ruled that the doctrine of *forum non conveniens* did apply to Petitioner's claims brought under the Montreal Convention. On that same date, Newvac filed a Renewed Motion to Dismiss on *forum non conveniens* grounds, offering to consent to liability and waiving the damage limits, provided the Court dismiss the action on *forum non conveniens* grounds to Martinique for resolution of the remaining damage issues under French law.

The District Court applied *forum non conveniens* to the Petitioners' Montreal Convention claims, accepted Newvac's admission of liability and then performed an improper *forum non conveniens* analysis only as to the remaining damage issues. In so doing, the District Court never considered any of Newvac's liability factors which occurred in Florida, where it was incorporated and maintained its home offices, and which surely would have resulted in the action remaining in the District Court. As a result, the liability portion of the case was determined by the District Court and the remaining 'damage' case was dismissed on December 7, 2007 to Martinique on *forum non conveniens* grounds for a determination of damages in a French Court. Meanwhile, the Petitioners steadfastly argued that the application of *forum non conveniens* and the *forum non conveniens* analysis which failed to include all public and private factors was flawed. The Eleventh Circuit Court of Appeals affirmed the application of the doctrine of *forum non conveniens* to the Petitioners' Montreal Convention claims and the *forum non conveniens*

dismissal on October 8, 2009; a rehearing was denied on December 30, 2009.

ARGUMENT FOR GRANTING THE WRIT

I. This Court should grant certiorari to resolve not only conflict with decisions between the Districts but also conflict with prior decisions of the United States Supreme Court.

A. The Eleventh Circuit's application of the *forum non conveniens* doctrine to dismiss claims brought under the Montreal Convention when the treaty specifically requires that an action for damages 'must be brought, at the option of the plaintiff, in the territory of one of the States Parties' is in conflict with the Ninth Circuit Decision in *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002).

The Eleventh Circuit Court of Appeal's decision is contrary to the Ninth Circuit Court of Appeal's decision in *Hosaka v. United Airlines,* 305 F.3d 989 (9th Cir. 2002) regarding the application of the doctrine of *forum non conveniens* to actions brought pursuant to the "Warsaw System."[1] In the instant case, the

[1] See the Introduction to the Minutes of the International Conference on Air Law – Convention for the Unification of Certain Air Rules for International Carriage by Air (the 1999 Montreal

(Continued on following page)

actions were brought under the Montreal Convention versus the Warsaw Convention provisions interpreted in *Hosaka*. But, as addressed herein, the Montreal Convention is merely the successor to the Warsaw Convention, the current evolution of the "Warsaw System" that has been in place for over 80 years, and little difference exists between the two nearly identical jurisdictional provisions.

Article 33-1 and 33-4 of the Montreal Convention[2] provides:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business

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Convention) page 1 describing the purpose of convening the convention; for the "Modernization and Consolidation of the 'Warsaw System.'"

[2] Article 33-1 and 33-4 of the Montreal Convention are almost identical to Article 28-1 and 28-2 of the Warsaw Convention. Compare Article 28:

> (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the court seised of the case.

> through which the contract has been made or before the court at the place of destination.
>
> * * *
>
> 4. Questions of procedure shall be governed by the law of the court seised of the case.

Points of contention arise when the doctrine of *forum non conveniens* is applied as a procedural rule of the Court seised of the case to defeat the express right of a plaintiff under Article 33-1 of the Montreal Convention to select where to bring suit.

In reaching its conflicting ruling, the Eleventh Circuit Court disregarded *Hosaka,* the only United States Appellate decision to have interpreted the almost identical language as contained in the predecessor Warsaw Convention. After extensive analysis in its opinion, the *Hosaka* Court concluded that the Warsaw Convention did *not* permit application of *forum non conveniens*.[3] In an effort to distance itself from the *Hosaka* precedent and to find a method by which to apply *forum non conveniens*, the Eleventh Circuit declared the Montreal Convention to be a new and different treaty from the Warsaw Convention. The Eleventh Circuit also made clear note that the Warsaw Convention was drafted in 1929 implying

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[3] See also *Milor v. British Airways, Plc.* [1996] Q.B. 702 (Eng. C.A.), a decision by a treaty sister state, wherein the British Court of Appeals also rejected application of *forum non conveniens* to a Warsaw Convention claim.

that its provisions were dated and that the *Hosaka* decision was ruling on the Warsaw Convention. What the Eleventh Circuit glossed over was that the *Hosaka* decision interprets the same language from the Warsaw Convention as is currently at issue and that the *Hosaka* decision was rendered in 2002, making it considerably more contemporary.

Perhaps more important to the instant case and to the value of *Hosaka,* as conflict precedent, is that although the 1999 Montreal Convention was called to modernize and make changes to some portions of the Warsaw Convention (mainly having to do with compensation to victims of air disasters), the negotiators for the various contracting states (including the United States) when negotiating the Montreal Convention intended to preserve the language and substance of the Warsaw Convention in order to preserve the large body of judicial rulings and precedent (such as *Hosaka*) that had been previously rendered by its member states under the Warsaw Convention.

Such consistent interpretation is what the Senate Foreign Relations Committee expressed when it submitted the 1999 Montreal Convention to the full Senate:

> In the nearly seventy years that the Warsaw Convention has been in effect, a large body of judicial precedent has been established in the United States. The negotiators of the Montreal Convention intended to preserve these precedents. According to the Executive Branch testimony, "[w]hile the Montreal

> Convention provides essential improvements upon the Warsaw Convention and its related protocols, efforts were made in the negotiations and drafting to retain existing language and substance of other provisions to preserve judicial precedent relating to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention and its related protocols." S. Exec. Rep. 108-8, at 3 (2003). *Baah v. Virgin Atlantic Airways, Ltd.*, 473 F.Supp.2d 591, 596 (S.D.N.Y. 2007).

Accordingly, the fact that *Hosaka* interprets the Warsaw Convention's Article 28 on jurisdiction versus the Montreal Convention's Article 33 on jurisdiction is of limited relevance. The pertinent provisions of both conventions were retained and the language as to jurisdiction remain nearly indistinguishable in both Conventions maintaining consistency. Further, when there were attempts to include *forum non conveniens* language into the Montreal Convention, those attempts were voted down. Even the District Court acknowledged in its Preliminary Forum Non Conveniens Order, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight," citing to *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

The Senate Foreign Relations Committee's report on the Montreal Convention to the Senate contradicts the Eleventh Circuit's suggestion that because the treaty is different, prior rulings such as *Hosaka* are distinguishable. To the contrary, it appears that portions were purposefully left untouched so that the precedential value of decisions such as *Hosaka,* although made under the Warsaw Convention, would be preserved for interpreting the jurisdictional provisions contained in the Montreal Convention and to avoid the unnecessary relitigation of issues already decided. *Hosaka* is still good law. Accordingly, the decision of the Eleventh Circuit Court of Appeals in this matter conflicts with the Ninth Circuit Court of Appeals decision in *Hosaka*. Relief to the passengers of WCA Flight 708 based on conflict with *Hosaka* is in order.

B. The Eleventh Circuit failed to follow *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) when it accepted a domestic Defendant's confession of liability provided it was dismissed on *forum non conveniens* grounds which resulted in dismissal to a foreign tribunal for only a damage determination.

The Eleventh Circuit Court of Appeal's decision is contrary to *Sinochem* and *Ruhrgas* regarding the application of a *forum non conveniens* analysis after the District Court had already resolved Newvac's

liability issues. Further, the *forum non conveniens* analysis performed by the District Court at that juncture was performed only as to the remaining damage issues, rendering same incomplete and defective. A court that fails to balance all relevant *forum non conveniens* factors abuses its discretion. *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983) (citing *Gulf Oil v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The *forum non conveniens* analysis by the District Court was performed too late in the litigation since all merits issues save for damages had already been resolved. *Forum non conveniens* is a threshold venue issue, and is to be applied before a court exercises its jurisdiction or significantly addresses the merits of an action.

A *forum non conveniens* analysis should be performed without addressing the merits of a lawsuit, since "Resolving a *forum non conveniens* motion does not entail any assumption by the court of the substantive law-declaring power." *Sinochem*, 549 U.S. at 424; *citing Ruhrgas AG v. Marathon Oil*, 526 U.S. 574, 584 (1999) (*forum non conveniens* is a threshold ground for "denying audience to a case on the merits"); *accord Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008) ("it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.") (fn. omitted).

In the instant case, it was only after it became evident that the District Court would find Newvac to

be a "contracting carrier" that Newvac gamed the court by stipulating to liability, attempting to whittle down the *forum non conveniens* factors to damages, to avoid trial in South Florida so that it would allow an escape to Martinique to face nominal damages. In so doing, Newvac invoked the "Law Declaring" judicial power and the exercise of the District Court's jurisdiction with its confession of liability. At that instant, all matters up to and through liability and causation were decided in their entirety, leaving only the assessment of damages. To then perform a *forum non conveniens* analysis at that late juncture only on the remaining damage issues was improper and constituted error under *Sinochem* and *Ruhrgas, supra.* Looking at the inverse, all that was sent to the Judge in Martinique was a case to determine damages, albeit under French law. In order to get to that point, the District Court exercised its jurisdiction and resolved all of the merits issues in the action except for damages. It could not thereafter "bifurcate" or apply a "damages only *forum non conveniens*" analysis which is a preliminary threshold venue challenge.

A party can waive venue by clear, overt acts evidencing an intent to waive, or impliedly, by taking some action inconsistent with an intent to pursue a venue challenge motion, and generally, these actions invoke the judicial power and jurisdiction of the courts. *Manley v. Engram*, 755 F.2d 1463, 1468 (11th Cir. 1985). Newvac's act of stipulating to liability was not only the equivalent of admitting to all liability

allegations in the Petitioners' Complaint [venue allegations included] but it also invoked the District Court's jurisdiction which was inconsistent with and waived any subsequent right to a venue challenge ("*forum non conveniens* is a supervening venue provision").

As to the evaluation of *forum non conveniens* factors addressed by the District Court, once having done the limited *forum non conveniens* analysis, one cannot dispute that the factors analyzed were less than would have been taken into consideration had all liability and damage issues been addressed. By that measure alone, the *forum non conveniens* analysis was flawed as less than all of the relevant public and private interest factors were considered.

The District Court clearly erred three times; first, it disregarded *Sinochem* and *Ruhrgas* by exercising its jurisdiction over the merits of the case to the point that only the damages issues remained and thereafter performing the *forum non conveniens* analysis on damage issues only; second, it allowed Newvac to stipulate to liability, invoke the District Court's jurisdiction, and then seek a *forum non conveniens* venue analysis when the stipulation effectively waived venue challenges; and third, when it failed to consider all of the relevant liability factors as part of its *forum non conveniens* analysis.

Accordingly, relief to the passengers of WCA Flight 708 is in order as the Eleventh Circuit's decision is in conflict with *Sinochem* and *Ruhrgas*.

CONCLUSION

The Eleventh Circuit's decision has raised not only conflict between the Districts but also conflict with prior decisions of the United States Supreme Court. Air travelers are now left uncertain as to whether the doctrine of *forum non conveniens* will be applied in the event they seek relief in a United States District Court pursuant to the Montreal Convention and if so, the nature and extent of the application of the doctrine of *forum non conveniens*. This Court should grant the Petition and resolve the conflict between the Districts and between the Eleventh Circuit's decision and this Court, providing uniformity for the international carriage by air, the very foundation of the Warsaw System.

Respectfully submitted,

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Attorney for Petitioners

Dated: March 30, 2010

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15828

D. C. Docket No. 07-61165-CV-UU

ANNICK JOELLE PIERRE-LOUIS, ANTOINE VINCENT GUYARD, THIBAUD GUYARD, a minor, by his father Antoine Vincent Guyard, individually as heirs of Abdon Joesph [sic] Pierre-Louis, deceased and individually as heirs of Lawrence Pierre-Louis, deceased, LEON NOEL EDMOND LORNE, MELANIE SUZIE MARTINE, a minor, by her mother Marie-Nelly Martie individually as heirs of Serge Nal, deceased,

Plaintiffs-Appellants,

versus

NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation, WEST CARIBBEAN AIRWAYS, S.A., a Columbian corporation,

Defendants-Appellees.

No. 07-15830

D. C. Docket No. 06-61813-CV-UU

SYLVIA BAPTE, Individually and as
personal representative of the Estates of
CHRISTIANE BAPTE, deceased, and
SYLVAIN BAPTE, deceased,
STEPHANIE ISABELLE BAPTE,
AUBIN CASIMIR, MARYVONNE BAPTE, et. al.,

Plaintiffs-Appellants,

versus

NEWVAC CORPORATION, a Florida corp.,
GO 2 GALAXY, INC., a Florida corp.,
WEST CARIBBEAN AIRWAYS, S.A.,
a Columbian Corp.

Defendants-Appellees.

No. 07-15902

D. C. Docket No. 06-22748-CV-UU

HENRI GALBERT, as personal representative
of the Estate of Nicolas Massal, Deceased, et al.,

Plaintiffs,

NICOLAS MASSAL, MURIELLE MASSAL,
MAEVA MASSAL, JOSEPH GALBERT,
MARIE GALBERT, JOACHIM-ARNAUD,
PAUL BERISSON, GEORGES BERISSON,
RAPHOSE, MARIE LUCE, JOSEPH BONIFACE,

SCAGLIONI, LANOIR, MONTLOUIS FELICTE, ALEX PETERS, BERTON, RAPHAELLE COUFFE, ROBERT COUFFE, MARIE PETERS, VIOLTON, SOHAN VENTAKAPEN, MICHEL VENTAKAPEN, EUDARIC, BERTIN MARIE-LUCE, CHARLES CABRERA, ROSAMOND, CATHERINE CABRERA, DENIS RAMIN, LAURENCE RAMIN, DURANVILLE, HENRI HOSPICE, ADREE HOSPICE, MAQUIABA, VICTORIN, IPHAINE, LEGENDART, BERMONT, FLORINE, LAURENT, MAGLOIRE, SAINTE-ROSE, ANTISTE, JEREMIE BOCLE, NAL, DIJON, PEPINTER, PORRO, BAPTE, TAUPIN,

Plaintiffs-Appellants
Cross-Appellees,

THE ESTATE OF FRANCIS BERTON, THE ESTATE OF MARIE-PIERRE CADARE, THE ESTATE OF RAPHAELLE COUFFE, MARIE-ODILE MONLOUIS-FELICITE, THE ESTATE OF DAVID SCAGLIONI,

Plaintiffs,

versus

WEST CARIBBEAN AIRWAYS, a Colombian corporation, ASEGURADORO COLSEGUROS, S.A., a Colombian corporation,

Defendants-Appellees,

NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation, JAQUES CIMETIER, individually,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(October 8, 2009)

Before BARKETT and HULL, Circuit Judges, and QUIST,* District Judge.

BARKETT, Circuit Judge:

This consolidated appeal arises from several wrongful death actions brought by the survivors of passengers killed in the crash of a McDonnell Douglas MD-82 aircraft, operating as West Caribbean Airways Flight 708, in the mountains of Venezuela. All of the appellants/cross-appellees, plaintiffs in the proceedings below ("Plaintiffs"), are natural persons and residents of Martinique, a Department of the Republic of France, and represent the deceased passengers of Flight 708.[1] The appellees/cross-appellants, defendants below ("Defendants"), are (1) West Caribbean Airways, a Colombian corporation operating the chartered plane that crashed, (2) two Florida Corporations, Newvac and Go 2 Galaxy, Inc., and (3) the president of Newvac and Go 2 Galaxy, Jacque

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* Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

[1] The crew members of Flight 708 are not plaintiffs in this action and have filed a separate action in the Southern District of Florida.

Cimetier.[2] Newvac is the entity that chartered the West Caribbean plane for round-trip flights from Martinique to Panama. After entering into the charter contract with West Caribbean, Newvac contracted with Globe Trotter Agency, a Martinique travel agency, and agreed to provide the aircraft it had chartered, as well as hotel, transportation, and sightseeing services, for excursions between Martinique and Panama. These excursion packages were then to be sold by Globe Trotter to individual passengers in Martinique.

Newvac moved to dismiss the suit on the basis of forum non conveniens and the district court granted the motion, finding that Martinique was the more convenient forum for resolution of the survivors' claims.[3] Plaintiffs appeal that ruling, arguing that the doctrine of forum non conveniens does not apply because the international treaty that regulates the liability of carriers to passengers on international flights, the Convention for the Unification of Certain Rules for International Carriage by Air (the "Montreal Convention" or "Convention"), precludes application of the doctrine as a matter of international

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[2] We will refer to Newvac, Go 2 Galaxy, and Cimetier collectively as "Newvac."

[3] Defendant West Caribbean Airways filed a motion to dismiss for lack of personal jurisdiction which has been held in abeyance until the forum non conveniens issue is finally decided.

law.[4] Alternatively, Plaintiffs argue that, even if the Convention permits application of the doctrine, the district court abused its discretion in applying it here.

I.

The doctrine of forum non conveniens permits a court with venue to decline to exercise its jurisdiction when the parties' and court's own convenience, as well as the relevant public and private interests, indicate that the action should be tried in a different forum. A defendant seeking dismissal for forum non conveniens bears the burden of demonstrating:

> (i) that an adequate alternative forum is available, (ii) that relevant public and private interests weigh in favor of dismissal, and (iii) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment. Relevant public interests include the familiarity of the court(s) with the governing law, the interest of any foreign nation in having the dispute litigated in its own

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[4] The district court's conclusions regarding the availability of forum non conveniens under the Montreal Convention is a legal determination which we review *de novo*.

> courts, and the value of having local controversies litigated locally.

Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1356-57 (11th Cir. 2008) (quotations and citations omitted).

Plaintiffs argue that the district court was precluded from applying this doctrine by the Montreal Convention, which is the exclusive means by which international air travel passengers can seek damages for death or personal injury in cases covered by it.[5] Chapter III of the Convention is entitled "Liability of the Carrier and Extent of Compensation for Damage." Article 33, located in Chapter III, is the jurisdictional provision which specifies in which fora such suits can be brought:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
>
> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts

[5] Both the United States and France are parties to the Montreal Convention.

> mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air. . . .

Thus, under Article 33 of the Convention, suits for damages by passengers on international flights can be filed in a limited number of fora, including, *inter alia,* the domicile of the "carrier" or the principal place of business of the "carrier." In the case of damage resulting from the injury or death of a passenger, suit may be brought in the passenger's permanent residence if the "carrier" operates air carriage services to or from that location.

The term "carrier" is undefined in the Convention. However, Chapter V of the Convention, entitled "Carriage by Air Performed by a Person other than the Contracting Carrier," addresses situations in which there is both a "contracting carrier" and an "actual carrier." Article 39, located in Chapter V of the Convention, provides the definitions for "contracting carrier" and "actual carrier":

> The provisions of [Chapter V] apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual

> carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

These definitions are significant because Article 40, in Chapter V, provides that "[i]f an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in [Chapter V], be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs."

In turn, Article 45 provides that a plaintiff may bring an action for damages under the Convention against the actual carrier or the contracting carrier, or against both together or separately, and Article 46 specifies the fora in which a plaintiff may bring such a suit. Article 46 provides that "[a]ny action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business." The district court found that Newvac and/or Go 2 Galaxy

was the "contracting carrier" for the flight at issue, and thus the lawsuit was filed in an appropriate forum pursuant to the Convention.[6]

The district court next found, however, that although it had jurisdiction, the Convention did not preclude application of forum non conveniens. In so holding, the district court relied on Article 33(4) of the Convention, which provides that "[q]uestions of procedure shall be governed by the law of the court seised of the case." The district court reasoned that because the doctrine of forum non conveniens is part of United States civil procedure, the Convention unambiguously permits its application in accordance with the law of the forum. The district court also concluded that the shared expectation of the states party to the Convention was that those states which

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[6] Newvac challenges this holding on cross-appeal. We find no merit to this contention. The district court properly concluded that because "Newvac knowingly assumed the responsibility to supply the aircraft and crew, and to otherwise conduct itself as a carrier, for the transportation of Globe Trotter's customers," it was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention. The court correctly rejected Newvac's argument that because the actual passengers were not known to Newvac at the time it contracted with Globe Trotter, Newvac could not be a "contracting carrier" under the Convention. The Newvac-Globe Trotter contract clearly provided that Globe Trotter would procure passengers for the flights and tour packages that would be supplied by Newvac and that, once the passengers had been procured, Globe Trotter would forward their information to Newvac so Newvac could issue the relevant travel documents, including individual passenger tickets.

recognized the doctrine could continue to apply it. We find no error in these conclusions.

When interpreting a treaty, we begin with the words of the treaty in the context in which the words are used. *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 699 (1988). Plaintiffs concede that the starting point of treaty interpretation is the relevant text and recognize that the treaty expressly provides that "[q]uestions of procedure" are governed by the law of the forum in which the case is validly brought. They argue, however, that because the Convention does not specifically affirm the availability of forum non conveniens, it should not be permitted in cases arising under it. We find this argument untenable for two reasons. First, there is no dispute that forum non conveniens is a "question[ ] of procedure" under U.S. law and thus it clearly falls within the ambit of Article 33(4). Second, under Plaintiffs' theory, all state procedural rules would have to be specifically enumerated in order to be applicable under the Convention, and we do not believe the Convention's drafters intended such an absurd result.

Plaintiffs further argue that to permit the application of forum non conveniens would undermine the purpose and implementation of the Convention's jurisdictional provisions, which have already enumerated the five "convenient" jurisdictions for purposes of adjudicating international carrier liability. Although we acknowledge Plaintiffs' concerns, we think the purpose of the Convention is adequately safeguarded under traditional forum non conveniens analysis. As

the district court pointed out, forum non conveniens would permit dismissal under the Convention only if the alternative forum was authorized to hear the case under Article 33(1) or (2) and was "demonstrably the more appropriate venue."

We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure – which can only reasonably be read to include *all* questions of procedure – are governed by the rules of the forum state.[7] As the district court correctly noted, the doctrine of forum non convenience is "firmly entrenched in the procedural law of the United States." In addition, we are satisfied that a district court may – where appropriate – exercise its discretion to apply forum non conveniens, without interfering with the implementation of the Convention, so

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[7] The two cases on which Plaintiffs principally rely, *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), and *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), are distinguishable and do not, as Plaintiffs suggest, create an ambiguity in Article 33(4). Among other distinguishing factors, both cases involved interpretation of the Warsaw Convention, a predecessor to the Montreal Convention drafted in 1929, at which time forum non conveniens, in its current form, was not recognized under U.S. law. Indeed, the *Hosaka* court explicitly noted that it was not addressing the applicability of forum non conveniens under the (at the time unratified) Montreal Convention.

long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.[8]

II.

Having found that the Convention is not a bar to the application of forum non conveniens, we turn to Plaintiffs' alternative argument that the district court abused its discretion in applying it here. As noted, a party seeking dismissal for forum non conveniens must demonstrate:

> (1) that an adequate alternative forum is available,
>
> (2) that relevant public and private interests weigh in favor of dismissal, and
>
> (3) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.

Plaintiffs do not challenge the district court's determination that Martinique is an adequate alternative forum or that they can reinstate their suit in Martinique without undue prejudice or inconvenience. Rather, Plaintiffs argue that the district court abused its discretion by failing to adequately analyze

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[8] Contrary to Plaintiffs' assertions, we think the drafting history of the Convention is clear that it was the shared intent of the states party that each state could continue to apply its procedural rules, including forum non conveniens.

the relevant private and public interest factors. We find no merit to Plaintiffs' arguments.

In determining whether to grant a motion to dismiss for forum non conveniens, courts consider such private interests as the comparative ease of access to evidence in the competing fora, the availability of witnesses and compulsory process over them, and the cost of obtaining evidence. *See, e.g., Renta,* 530 F.3d at 1356-57; *King v. Cessna Aircraft Co.,* 562 F.3d 1374, 1383-84 (11th Cir. 2009); *La Seguridad v. Transytur Line,* 707 F.2d 1304, 1307 (11th Cir. 1983).

Ordinarily, these private factors would weigh in favor of a plaintiff residing in the forum state and therefore, we apply a presumption of convenience to U.S. residents suing in U.S. courts. *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.,* 382 F.3d 1097, 1100-01 (11th Cir. 2004). This deference, though still applicable, is weakened when plaintiffs are non-U.S. residents. *Id.* Plaintiffs argue, however, that although they are not U.S. residents, their choice of forum is entitled to heightened deference because their access to U.S. courts is granted by an international treaty with a specific venue provision. The logic of this conclusion stems from the fact that the Convention has already done part of the work in selecting a convenient forum -- all potential jurisdictions under the Convention bear some connection, broadly speaking, to the air crash. Thus, their choice of forum is entitled to greater deference than non-U.S.-resident plaintiffs *not* acting pursuant to a

treaty. Among other things, Plaintiffs point out that, unlike other defendants who may be surprised by U.S. lawsuits by foreign plaintiffs, international air carriers are aware of the Montreal Convention and can prepare, with their insurers, for the possibility of liability under it.

Regardless of the merits of Plaintiffs' argument on this point, however, the analysis cannot end with a presumption of convenience, but must address the actual convenience of the various available fora. *See Cessna Aircraft Co.*, 562 F.3d at 1383 (noting that "although citizenship often acts as a proxy for convenience in the forum non conveniens analysis, the appropriate inquiry is indeed convenience"); *see also Aldana v. Del Monte Fresh Produce N.A., Inc.*, ___ F.3d ___, No. 07-15471, 2009 WL 2460978, at *9 (11th Cir. Aug. 13, 2009) (affirming the district court's dismissal on the basis of forum non conveniens where plaintiffs were residents of the U.S., but all other private interest factors favored dismissal). As the district court correctly pointed out, the greater deference accorded to a U.S. resident follows from the reasonable assumption that a plaintiff choosing her home forum does so because it is convenient. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

In this case, as the district court noted, Defendants have conceded liability and waived applicable damage caps under the Convention in the Martinique court. Thus, the only issue to be tried – and therefore the principle focus of the convenience analysis – is

the amount of damages to which each Plaintiff is entitled. Therefore, with respect to the availability of evidence and witnesses, the analysis strongly favors Martinique, the residence of all the Plaintiffs. Plaintiffs do not dispute that all of the witness and documentary evidence regarding damages, as well as all or virtually all of the non-party factual witnesses, are located in Martinique, beyond the compulsory process of the district court. To the extent that non-party witnesses in Martinique would be willing to testify in Florida, they would have to travel to the United States at considerable expense and personal inconvenience.

Plaintiffs counter that any expense or other burden associated with gathering and producing damages evidence will be theirs to bear, because it is their burden to prove damages. They further point out that Defendants have offered no details regarding any actual inability to procure non-U.S. witnesses or evidence on the damages issue and that, in the days of satellite telephones and inexpensive air travel, these arguments are entitled to less weight. Although we acknowledge Plaintiffs' arguments on this point, we cannot say that the district court abused its discretion in determining that the United States was an inconvenient forum for *both* parties in which to determine damages. In other words, the ability of the Defendants to prepare their defensive case with

respect to damages is a proper consideration in the convenience analysis.[9]

Nor did the district court err when it rejected Plaintiffs' argument that because Defendants' potential third-party claims against U.S. manufacturers could more conveniently be brought in the United States, private interest considerations militated against dismissal.[10] Plaintiffs do not contend that the

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[9] The district court recently denied a dismissal on forum non conveniens grounds in the related case brought by the crew members who perished in the same crash as Plaintiffs. *In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009). Plaintiffs point out that the crew members, like Plaintiffs, are non-U.S. residents, and therefore litigation of their claim in a U.S. court gives rise to the same evidence issues the district court relied upon in dismissing their case on forum non conveniens grounds. We disagree. The crew member claims are product liability claims and thus are distinct from Plaintiffs' claims under the Montreal Convention, pursuant to which liability is presumed. We are therefore not persuaded that the district court's forum non conveniens analysis as to Plaintiffs' claims is inconsistent with, or should be affected by, its adjudication of the crew member claims in a U.S. forum.

[10] Plaintiffs argue that the process of apportioning liability between the carrier Defendants and the U.S. manufacturers in France, with its complex evidentiary and translation issues, will cause them an "inconvenient" delay. However, we are not convinced that such a delay will be significantly worse in France than in the United States, nor in any event do we believe that the district court's rejection of this argument constitutes an abuse of discretion. Moreover, Plaintiffs' reliance on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) is somewhat misplaced. In that case, it was Defendants who argued that Plaintiffs' choice of forum would prejudice their ability to implead third parties, and the Supreme Court agreed that it was

(Continued on following page)

U.S. manufacturers cannot be impled [sic] in an action in Martinique nor that evidence pertaining to such third-party claims is not available in Martinique.[11] Although access to U.S. manufacturers' evidence is admittedly somewhat more difficult in a foreign forum as opposed to the United States, the district court did not abuse its discretion in finding that this burden – which is Defendants alone to bear in any event – was outweighed by the inconvenience to both parties of accessing damages evidence in Martinique, respecting over a hundred decedents and their beneficiaries.

Public interest considerations include factors such as (1) the forum's interest in entertaining the suit; (2) court congestion and jury duty generated by

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more convenient to resolve all claims in one forum. Here, of course, Defendants have proposed the alternative forum.

[11] Plaintiffs argue that it is not their burden to demonstrate that evidence regarding third-party claims will be accessible in Martinique, *Leon v. Million Air*, 251 F.3d 1305, 1311 (11th Cir. 2001), and that the district court impermissibly shifted the burden of persuasion to Plaintiffs to demonstrate why Martinique would be inconvenient to them. While it is true as a matter of law that Defendants bear the burden of persuasion on forum non conveniens, we are not persuaded by this argument. The district court's observation that Plaintiffs would not be inconvenienced by litigating third-party claims in Martinique did not impermissibly shift the burden to Plaintiffs but instead was simply one of many factors to be weighed in assessing the various private interests of the litigants. And, we agree with the district court that the relative ease of access to third-party evidence, unlike damages evidence, ultimately will be of concern *only* to Defendants.

the lawsuit; (3) the desirability of having localized controversies decided at home; and (4) the difficulty in determining applicable law and applying foreign law. *La Seguridad,* 707 F.2d at 1307. The district court likewise did not abuse its discretion in determining that these factors weigh in favor of Martinique as the proper forum for Plaintiffs' claims.

As the district court pointed out, although the United States has an interest in deterring the alleged tortious conduct of Newvac and other U.S. third-party defendants, that interest is outweighed by Martinique's interest in adjudicating actions that aim to redress injuries to its citizens.[12] Moreover, any deterrent impact on Newvac is not eliminated merely because damages are determined in Martinique rather than in the United States. Therefore, the United States' interest in adjudicating Plaintiffs' claims does not justify the enormous commitment of time – both of the court and of jurors – and other judicial resources that would be consumed by the presentation of live testimony and documentary

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[12] Plaintiffs argue that Martinique has a state interest in ensuring that the rights of its citizens to their choice of forum under the Montreal Convention are respected. They further argue that the United States has a significant interest in deterring corporate misconduct like that of Newvac, which continues to act as a contracting carrier under U.S. laws. Again, while we acknowledge the competing public interests at work in this analysis, we do not believe the district court abused its discretion in crediting the undeniable interest of Martinique in redressing injuries to its citizens.

evidence in a foreign language. Finally, the district court found that although litigating third-party claims in Martinique would be more convenient in a U.S. forum than in Martinique, the burden of translation in Martinique with respect to these claims is not as great as the burden of presenting French damages evidence in the United States. This is so because the Martinique court designated to hear Montreal Convention claims does so in writing only and will not hear testimony. Thus, Defendants will not bear the burden of translating live testimony in Martinique as both parties would in the United States.[13]

In sum, the district court did not err in determining that the Montreal Convention does not preclude the use of forum non conveniens in U.S. courts nor did it abuse its discretion in dismissing Plaintiffs' claims on forum non conveniens grounds.

AFFIRMED.

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[13] We are not persuaded by Plaintiffs' argument that the district court erred in failing to consider the fact that Defendants made no argument that the congestion factor supports dismissal. The failure of Defendants to make an argument on this issue is not fatal to their forum non conveniens argument if, as the district court determined, other factors clearly support a dismissal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, S.A., *et al.*,

Defendants. /

PRELIMINARY ORDER ON DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF FORUM NON CONVENIENS

(Filed Sept. 26, 2007)

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens. D.E. 54[1] This order follows a May 11, 2007 status conference during which the parties agreed to brief the following discrete issues pertaining to Defendants' Motion: (1) whether Newvac is a "contracting carrier" within the scope of the Montreal Convention;[2] and, whether the Court may apply the *forum non conveniens* doctrine in an action arising under the Montreal Convention. *See* D.E. 94 (Order Setting Briefing Schedule); 95 (Order Requesting a Statement of Interest from the United

[1] The Motion was filed by Defendants Jacques Cimetier, Newvac Corporation, and Go 2 Galaxy, Inc.

[2] The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention").

States);[3] 97 (Tr. of Status Conf.). The Court has considered the parties' memoranda (D.E. 101, 113), the United States's Statement of Interest (D.E. 116), and is otherwise fully advised in the premises.

Facts

This action arises out of the August 16, 2005 airplane crash in Venezuela of West Caribbean Airways flight 708, while en route from Panama to Martinique.[4] Plaintiffs are, and the decedents were, residents of Martinique, a Department of the Republic of France. *See* D.E. 152 (Am. Compl.) at paras. 7, 74. Defendant West Caribbean Airways, S.A. is a Colombian corporation with offices in Medellin, Colombia. *Id.* at para. 9. Defendants Newvac Corporation and Go 2 Galaxy, Inc. are Florida corporations. *Id.* at para. 15.

On March 15, 2005, Newvac entered into a "charter contract" with West Caribbean Airways in Medellin, Colombia, pursuant to which West Caribbean was to provide a 152-passenger MD-81 aircraft and crew, for charter flights occurring during May, July and August 2005. *See* D.E. 99 (McCune Decl.),

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[3] The Court permitted the United States to submit a statement of interest, pursuant to 28 U.S.C. § 517, respecting its position as to the availability of the *forum non conveniens* doctrine in a case governed by the Montreal Convention.

[4] *See* Brian Ellsworth, *Airline Crash in Venezuela Kills 160* (visited Aug. 14, 2007) <http://www.npr.org/templates/story/story.php?storyId=4802464>.

Ex. "5" (English translation of Charter Contract, originally in Spanish, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Thereafter, on April 25, 2005, Newvac entered into a "contract for air chartering" with Globe Trotter Agency, a travel agency in Martinique, whereby Newvac agreed to provide the aircraft it chartered from West Caribbean to Globe Trotter for a series of excursions between Martinique and Panama. *See* D.E. 99 (McCune Decl.), Ex. "7" (English translation of Charter Contract, originally in French, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Newvac also provided Globe Trotter with the hotel, transportation and "sightseeing" for these excursions. *See* D.E. 145 (Cimetier Depo.) at 185:6-186:4. All of the passengers were killed when West Caribbean's aircraft crashed during their return trip from Panama following one of the excursions sold by Globe Trotter. *See* D.E. 152 (Am. Compl.) at paras. 31-33, 41, 52, 75; D.E. 113 (Defs.' Reply) at 5.

Contracting Carrier

The parties dispute whether Newvac is a "contracting carrier," as that term appears in Article 39 of the Montreal Convention (titled "Contracting Carrier – Actual Carrier"), which states:

> The provisions of this Chapter[5] apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Montreal Convention, art 39. This issue has importance because Plaintiffs wish to argue that this Court has jurisdiction over, and is required to adjudicate this dispute pursuant to Articles 33 and 46 of the Montreal Convention due to Newvac's domicile in the Southern District of Florida. *See, e.g.*, D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 4-5.

Plaintiffs first submit that there *must* be a "contracting carrier" in this case because the actual carrier – West Caribbean Airways – "had no opportunity to enter into a direct contractual relation with the passengers," and according to Plaintiffs, only Newvac fits within the term's definition. *Id.* at 6. Specifically,

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[5] "[T]his Chapter" refers to Chapter V of the Convention, titled "Carriage by Air Performed by a Person other than the Contracting Carrier."

Plaintiffs submit that Newvac acted as a principal in this case because it profited by contracting for the seating capacity on the West Caribbean aircraft, thereafter reselling it for a higher price to Globe Trotter, which acted on behalf of passengers when it sold individual seats on the aircraft. *Id.* Plaintiffs add that West Caribbean performed "the whole or part of the carriage" under the authority of its contract with Newvac. *Id.* at 6-7 (also citing law review articles[6] that Plaintiffs submit in support of their argument that a tour operator that packages and resells air transportation is a "contracting carrier" under the Montreal Convention).

Plaintiffs further note that the term "carrier" is not defined in the Warsaw[7] or Montreal Conventions, and therefore, urge consideration of how the United States defines "carrier" in other related contexts. *Id.* at 8. In this regard, Plaintiffs cite section 40102(a)(2) of the Federal Aviation Act (*i.e.*, 49 U.S.C. § 40102(a)(2)), which defines an "air carrier" as "a

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[6] Trevor Atherton, *Unlimited Liability for Air Passengers: The Position of Carriers, Passengers, Travel Agents and Tour Operators Under the IATA Passenger Liability Agreement Scheme*, 63 J. Air L. & Com. 405, 417-18 (1997); Tory A. Weigand, *The Modernization of the Warsaw Convention and the New Liability Scheme for Claims Arising Out of International Flight*, 84 Mass. L. Rev. 175, 180 (2000).

[7] The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. § 40105 (hereinafter "Warsaw Convention").

citizen of the United States undertaking by any means, directly *or indirectly,* to provide air transportation." *Id.* (emphasis added). In addition, Plaintiffs cite 14 C.F.R. § 380.2, promulgated thereunder, which states in pertinent part: "Indirect air carrier means any person who undertakes to engage indirectly in air transportation operations and who uses for such transportation the services of a direct air carrier." *Id.* Plaintiffs also refer to the Air Transportation Operations Inspector's Handbook of the U.S. Federal Aviation Administration, Order 8400.10, Change 36, Vol. 2, Ch. 1, § 2 at 2-12, which provides in pertinent part that:

> An indirect air carrier is a company that contracts aircraft and crew services from an air carrier or commercial operator but may not engage in control over the operational function of any flight. Examples of indirect air carriers include freight forwarders, brokers, or public charter operators. An indirect air carrier will act as an agent for either the customer or the air carrier. . . .

See D.E. 99 (McCune Decl.), Ex. "12". In addition, Plaintiffs cite federal cases supporting the proposition that travel agents, tour operators, charterers and nominal "social clubs" that sell tours and air transportation publicly may be considered "indirect air carriers" subject to certification and similar requirements under the FAA. *See* D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 9 (citing *Monarch Travel Servs. v. Associated Cultural Clubs,* 466 F.2d 552 (9th Cir.

1972), *cert. denied,* 410 U.S. 967 (1973); *Arkin v. Trans Int'l. Airlines, Inc.,* 568 F. Supp. 11 (E.D.N.Y. 1982); *U.S. v. Caribbean Ventures, Ltd.,* 387 F. Supp. 1256 (D.N.J. 1974)).

Plaintiffs also cite the U.S. Department of Transportation's "Notice on the Role of Air Charter Brokers in Arranging Air Transportation," which states in pertinent part:

> The Enforcement Office has become aware that there are air charter brokers not holding economic authority from the Department who solicit and contract directly with a charter customer for air transportation and then solicit and separately contract directly with a direct air carrier to operate the air service promised to the charter customer under the charter broker's contract with that customer. With respect to payment for the proffered air transportation, two separate transactions commonly occur: (1) The air charter broker collects all of the monies paid by the charter customer pursuant to the broker's contract with the customer, and (2) the air charter broker then turns over a portion of these monies to the direct air carrier pursuant to the broker's separate contract with the carrier. In such instances, the air charter broker is not acting as an agent for the operating carrier or for the charter customer. Rather, the air charter broker is acting as a principal in both transactions, and, with respect to its relationship with the customer, is engaged in air

> transportation as an indirect air carrier without economic authority in contravention of the statutory and Department licensing requirements described above.

Id. (citing 69 Fed. Reg. 61429-02, 61430 (2004)). Plaintiffs submit that this description fits Newvac's role in the instant case, as Newvac made two separate transactions, one with Globe Trotter and the other with West Caribbean, making a profit on the difference between what it paid for the air transportation and the price it received from Globe Trotter. *Id.* at 9-10.

Finally, Plaintiffs suggest Newvac is a "loophole airline" and that public policy dictates that therefore, Newvac be considered a "contracting carrier." *Id.* at 10. The "loophole airline" label is given to unregulated U.S. entities that compete with U.S. carriers by chartering cheaper foreign-flagged aircraft with less stringent safety standards. *Id.* The problem of "loophole airlines" was addressed in a 1991 hearing before the Subcommittee on Investigations and Oversight of the U.S. House of Representatives' Commission on Public Works and Transportation. *Id.*

In response to Plaintiffs' arguments, Defendants maintain that Newvac was not a "contracting carrier" because there were no passengers with whom to contract when Newvac entered into its contract with Globe Trotter. *See* D.E. 113 (Defs.' Reply) at 4. Thus, Defendants submit that Newac [sic] could not have made a "contract of carriage" with any "passenger"

nor "a person acting on behalf of the passenger," as required by the literal terms of Article 39. *Id.*

Defendants add that Newvac was an "independent intermediary" not in privity with any passenger in that: (a) Newvac sold the entire capacity of each flight to Globe Trotter; (b) it was for Globe Trotter, at its own risk, to sell individual seats to passengers; and; (c) the "carrier" to operate the flights was West Caribbean. *Id.* at 4-5. Further, Defendants note that Globe Trotter advertised the subject flights, solicited the passengers, and entered into "contracts of carriage" at the retail level with each of them. *Id.* Thus, Defendants submit that it is impossible to argue that Newvac, whether as principal or agent, entered into any contracts of carriage with any of the passengers. *Id.*

With respect to Plaintiffs' argument that Newvac acted as a principal because it sold the seats on the aircraft for more than it paid West Caribbean, Defendants submit that if that is the test, then Globe Trotter was likewise acting as a principal in entering into contracts of carriage with the passengers because Globe Trotter sold the seats to each passenger for more than it paid Newvac. *Id.* at 5. According to Defendants, "it is an entirely illogical leap for plaintiffs to argue that merely because Newvac was acting as a principal vis-a-vis [West Caribbean], it was also acting as a principal in making contracts of carriage with the individual passengers." *Id.*

Defendants also note, respecting Plaintiffs' citation to U.S. Department of Transportation precedent and law, that Newvac's contracts with West Caribbean and Globe Trotter were executed abroad. *Id.* at 5-6. Accordingly, Defendants submit that "[f]or plaintiffs to argue that U.S. or U.S.D.O.T. law should apply to such foreign executed contracts, especially when the flight had no contact with the United States and none of the passengers was an American citizen or resident, would represent an extraterritorial extension of U.S. jurisdiction that would be both unprecedented and highly precarious in the history and current practice of international air law." *Id.* at 6.

Finally, Defendants submit that Plaintiffs' position would be bad policy in that it would expose "ordinary travel agents, individuals and small companies" to full common carrier liability. *Id.* at 6. According to Defendants, the liability requirements of a carrier operating to or from the United States are minimally $300,000,000, and for France $450,000,000. *Id.* Thus, Defendants maintain that imposing such requirements on individuals like Cimetier or companies like Newvac "would jeopardize the economic viability of very substantial segments of the airline industry." *Id.*

Treaty Interpretation Principles

As noted in *Eastern Airlines, Inc. v. Floyd,* 499 U.S. 530 (1991):

> When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages. Moreover, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Id. at 534-35 (internal citations and quotation marks omitted); *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 167 (1999) (stating: "It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties") (internal citation and quotation marks omitted). Further, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982).

Analysis

Again, Article 39 of the Montreal Convention states:

> The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Montreal Convention, art. 39. The Court finds that the foregoing language is unambiguous and that under the facts of this case, it applies to Newvac.

By the plain terms of Article 39, Newvac is a "contracting carrier" in this case if it was: (1) a person ("the contracting carrier") that made a contract of carriage governed by the Montreal Convention; (2) it did so as a principal; (3) the contract was with a passenger or consignor, or with a person acting on either's behalf; and (4) another person ("the actual carrier")

performed the carriage by virtue of authority from the [sic] "the contracting carrier."

First, Newvac is "a person" that made a "contract of carriage governed by [the] Convention." In this regard, the Court notes that the Convention "applies to all international carriage of persons . . . by aircraft. . ." (*id.*, art. 1(1)), and that the contract between Newvac and Globe Trotter concerned the "international carriage" of persons by aircraft (*i.e.*, carriage of passengers from Martinique-Panama-Martinique onboard West Caribbean's MD-81 aircraft). *See* D.E. 99 (McCune Decl.), Ex. "7" (English translation of Newvac-Globe Trotter contract); Montreal Convention, art. 1(2) (providing that "international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination . . . are situated either within the territories of two States Parties,[8] or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. . . ."). Thus, the Court finds that the Newvac-Globe Trotter contract is a contract of carriage governed by the Montreal Convention.

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[8] France and Panama became "State Parties" to the Convention prior to the accident at issue herein. *See* International Civil Aviation Organization List and Current Status of International Air Law Multilateral Treaties/Montreal Convention (available at <http://www.icao.int/icao/en/leb/mtl99.pdf> (visited Sept. 4, 2007)).

Further, Newvac acted as a "principal" when it made the contract of carriage with Globe Trotter. Under international and maritime law, a "person" can act either as an agent or a principal when contracting for transportation, depending on whether it acts on its own initiative or for another.[9] In this case, Newvac acted as a "principal" because *it* contracted with West Caribbean for its aircraft and crew, and then independently contracted to supply air transportation and ancillary services to Globe Trotter. *See* D.E. 99

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[9] *Cf. James N. Kirby, Pty Ltd. v. Norfolk Southern Ry. Co.*, 300 F.3d 1300, 1305-06 (11th Cir. 2002), *rev'd on other grounds sub nom. Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004) (explaining that freight forwarders may act as agents of cargo owners or as principals and concluding that the freight forwarder under consideration acted as a principal); *accord* Clive M. Schmitthoff, *Schmitthoff's Export Trade, The Law and Practice of International Trade* 302-05 (9th ed. 1990) (also noting that in the context of modern international transportation Conventions such as the Guadalajara Convention, a "contractual carrier is a person who has contracted to move the goods from one place to another, although he does not carry out the transportation himself but leaves this task to the actual carrier with whom he has contracted"); *id.* at 623 (noting that a "contracting carrier" is one who "as a principal, makes an agreement for carriage with the consignor or the consignor's agent. In many cases the contracting carrier will be the first or sometimes the only carrier by air, but the contracting carrier may also be one who merely issues a waybill, or an aircraft charterer, or a cargo consolidator or forwarder"); *see also* 69 Fed. Reg. 61429-02, 61430 (2004) (quoted above, outlining the scenario where an air charter broker acts as a principal, not as agent, respecting its relationship with both the air carrier and the customer, and with respect to the latter, "is engaged in air transportation as an indirect air carrier. . . .").

(McCune Decl.). Ex. "7" (English translation of Newvac-Globe Trotter contract) at 1 (providing that "[Globe Trotter] wishes to charter seats from [Newvac]" and that "[Newvac] shall make available . . . passenger transport. . . .").

In reaching this conclusion, the Court has considered Defendants' contention that Newvac cannot be deemed a "principal" because it merely assigned the aircraft's seating capacity to Globe Trotter. But this argument, as the Court understands it, assumes that Newvac cannot be characterized as a "principal" without the Court identifying a corresponding agent, in this case Globe Trotter. This assumption is unwarranted. The language of Article 39 is derived from the Guadalajara Convention's definitions of "contracting carrier" and "actual carrier." *See* S. Treaty Doc. No. 106-45, 1999 WL 33292734, at 10, 18, 34.[10] The term "principal" under Guadalajara did not contemplate the necessity of an agency relationship; that is, that because there is a "principal" there must be an agent. The term was specifically used to clarify that those acting solely as agents could not qualify as "contracting carriers."[11] In any event, Defendants'

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[10] Citations are to the page numbers in the printed document.

[11] *See* International Civil Aviation Organization Doc. 8301-LC/149-1, Minutes of the International Conference on Private Air Law, Guadalajara, Aug.-Sept. 1961, at 39-48, 186-89, 199-200, 262-64; Doc. 8301-LC/149-2, Documents, at 19, 46, 48; Restatement (Third) of Agency § 1.01 cmt. b (2006) (recognizing that: "the terminology of agency is widely used in commercial

(Continued on following page)

argument relies on a distortion of the facts because during the term of its contract with Globe Trotter, Newvac remained responsible for supplying the aircraft and crew, and monitoring and ensuring West Caribbean's performance of the Newvac-Globe Trotter contract. *See* D.E. 99 (McCune Decl.). Ex. "7" (English translation of Newvac-Globe Trotter contract) at 1; D.E. 145 (Cimetier Depo.) at 178:16-179-12, 190:25-191:7, 212:21-214:17. These facts show that West Caribbean was acting "by virtue of authority from [Newvac]" in transporting the passengers. More importantly, they illustrate that Newvac stepped into the shoes of and assumed the role of "carrier."

Finally, although Defendants advance an interpretation of the language, "acting on behalf of the passenger," as requiring Globe Trotter to be acting on behalf of passengers identified prior to Newvac's execution of the Newvac-Globe Trotter contract, the Court declines to adopt this rigid construction. Courts utilize flexible principles to interpret treaty provisions and effect the drafters' intentions. *See Floyd,* 499 U.S. at 535 (noting that treaties are construed more liberally than private agreements); *accord Western Digital Corp. v. British Airways, PLC,* [2001] 1 All E.R. 109 at paras. 38-40; *Air France v. Saks,* 470

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settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. . . . In commercial settings, the term "principal" is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another").

U.S. 392, 405 (1985) (defining the term "accident" in the context of Article 17 of the Warsaw Convention and noting that "[t]his definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries"). Newvac and Globe Trotter clearly contemplated that Globe Trotter would procure passengers for the flights and the fully inclusive tour packages that were to be supplied by Newvac, and that Globe Trotter would act on behalf of the passengers in this regard. The parties' expectations are evident from the Newvac-Globe Trotter contract, which required that once the passengers purchased their tour packages from Globe Trotter, Globe Trotter was obligated to forward the passengers' information to Newvac so that Newvac could, among other things, issue the corresponding travel documents, including the individual passenger tickets. *See* D.E. 99 (McCune Decl.), Ex. "7" (English translation of Newvac-Globe Trotter contract) at 4, para. 8; 145 (Cimetier Depo.) at 212:21-214:17. Thus, the fact that the actual passengers were not known at the inception of the Newvac-Globe Trotter contract should not, in the Court's view, be determinative. *Cf. Block v. Compagnie Nationale Air France,* 386 F.2d 323, 334-36 (5th Cir. 1967) (examining whether the Warsaw Convention applied in the context of an accident involving a chartered aircraft and determining, *inter alia,* that under the facts of the case (*e.g.,* the charterer "was to obtain the passengers for the flight"), the charterer acted on behalf of the passengers in entering into the charter agreement). Rather, the focus should be on the fact that Newvac knowingly

assumed the responsibility to supply the aircraft and crew, and to otherwise conduct itself as an air carrier, for the transportation of Globe Trotter's customers. Therefore, the Court finds that Newvac was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention.[12]

Forum Non Conveniens

Plaintiffs, relying in large part on *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), contend that Newvac's status as a "contracting carrier" confers mandatory jurisdiction on this Court pursuant to Article 33 of the Montreal Convention, thereby precluding dismissal of the actions based on *forum non conveniens*. *See, e.g.*, D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 11-27. Defendants respond that the Montreal Convention's drafting history reflects that the signatory countries contemplated that *forum non conveniens* would remain a valuable procedural

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[12] Although the Court is not persuaded that the authority Plaintiffs cite from the Federal Aviation Act (*see* D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 8-10) is applicable to the issue of whether Newvac is a "contracting carrier" under the Montreal Convention, the citations were at least helpful in illustrating the role that "indirect air carriers," which engage in conduct not unlike that of Newvac herein, play in relation to passengers and carriers. *See, e.g.*, Romualdo P. Eclavea, Annotation, *Regulation of air travel clubs, charter flights, and the like, by the Civil Aeronautics Board*, 27 A.L.R. Fed. 154 (1976) (outlining federal decisions interpreting pertinent statutory and regulatory provisions).

tool for the dismissal of litigation with tenuous relationships to the United States. *See, e.g.,* D.E. 113 (Defs.' Reply) at 9-16.

The Ninth Circuit Court of Appeals held in *Hosaka* that "Article 28(1)[13] of the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for forum non conveniens." *Hosaka,* 305 F.3d at 993, 1004. In so holding, the Ninth Circuit rejected the decision of the Fifth Circuit Court of Appeals, the only other United States appellate court to have considered the issue, that Article 28(1) of the Warsaw Convention did not prevent a district court from considering and applying the doctrine of *forum non conveniens. See In re Air Crash Disaster Near New Orleans, La., on July 9, 1982,* 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom. Pan American World Airways, Inc.*

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[13] Article 28 provided:

> (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Warsaw Convention, art. 28.

v. Lopez, 490 U.S. 1032 (1989), *vacated in part and aff'd in part on remand* 883 F.2d 17 (5th Cir. 1989).[14]

In reaching its conclusion, the Ninth Circuit in *Hosaka* found the text of Article 28 to be ambiguous, but that the treaty's purposes, its drafting history, as well as evidence of the parties' post-ratification understanding and the treatment of the issue in other treaties and by other courts, supported its decision. *See Hosaka,* 305 F.3d at 1003-04. However, the Warsaw Convention was negotiated at a time when the doctrine of *forum non conveniens,* as it exists today, was not even recognized by United States courts. *Id.* at 999, n.13, 1002-03; *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 248 n.13 (1981). Further, the Ninth Circuit acknowledged in *Hosaka* that the Montreal Convention is an entirely new treaty and that Article 33, although similar to Article 28, has its own distinct drafting history shedding no light on the intention of the drafters of the Warsaw Convention respecting the availability of *forum non conveniens* in a case arising

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[14] The only other published decision from a United States court addressing the availability of *forum non conveniens* in Warsaw Convention cases is *In re Air Crash Off Long Island, N.Y., on July 17, 1996,* 65 F. Supp. 2d 207 (S.D.N.Y. 1999). In that case, the district court held that "[f]orum *non conveniens* is a procedural tool available to U.S. courts and thus squarely falls within the literal language of [Warsaw Convention] Article 28(2)." *Id.* at 214. On the other hand, in *Milor S.R.L. v. British Airways, PLC,* [1996] Q.B. 702 (Eng. C.A.), the Court of Appeal of England concluded that Article 28 of the Warsaw Convention precluded application of the *forum non conveniens* doctrine in Convention cases.

thereunder. *See Hosaka,* 305 F.3d at 999-1001. Thus, the Ninth Circuit made clear in *Hosaka* that it was not opining on the availability of *forum non conveniens* dismissals under the then unratified Montreal Convention: "We offer no opinion as to whether the text and drafting history of the Montreal Convention demonstrate whether forum non conveniens would be available in an action brought under that as-yet-unratified treaty." *Id.* at 1001 n.17.

For these reasons, *Hosaka* has limited precedential value on the ultimate issue of the availability of *forum non conveniens* under the Montreal Convention. Accordingly, this Court is left with the duty to resolve – apparently as a matter of first impression – whether the doctrine of *forum non conveniens* can be considered in a case arising under the Montreal Convention. To do so, the Court again resorts to the flexible principles applicable to treaty interpretation, examining first the text of the treaty and the historical context in which it was drafted, the purpose of the treaty, its drafting history, and the post-ratification understanding of the Convention States. *See Floyd,* 499 U.S. at 534-35; *Tseng,* 525 U.S. at 167. The Court also considers the United States' Statement of Interest filed in this action; "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Avagliano,* 457 U.S. at 184-85; *accord Sanchez-Llamas v. Oregon,* 126 S. Ct. 2669, 2685 (2006). In the final analysis, however, it is the Court's responsibility "to

give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Tseng*, 525 U.S. at 167 (quoting *Saks*, 470 U.S. at 399).

a. Text of the Treaty

Article 33 ("Jurisdiction") provides that:

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
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> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

> 3. For the purposes of paragraph 2,
>
> (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
>
> (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.
>
> 4. Questions of procedure shall be governed by the law of the court seised of the case.

Montreal Convention, art. 33.

Like Article 28 of the Warsaw Convention, the text is silent respecting the *forum non conveniens* doctrine, but it expressly provides that questions of procedure shall be governed by the law of the forum. However, unlike the *Hosaka* Court, this court finds the above-quoted language to be unambiguous and dispositive: since the doctrine of *forum non conveniens* was firmly entrenched in the procedural law of the United States by the time the Montreal Convention was drafted, the text by implication clearly permits the application of the doctrine in domestic litigation.

This construction, moreover, comports with the rules commonly used by courts to construe treaty provisions. It is consistent with the international law

principle endorsed by the Supreme Court of the United States, that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard v. Greene,* 523 U.S. 371, 375 (1998) (per curiam); *accord Sanchez-Llamas,* 126 S. Ct. at 2682-83; *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 700 (1988); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for Southern Dist. of Iowa,* 482 U.S. 522, 539 (1987); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (noting that "[g]iven the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters"). It harmonizes and gives effect to every word of Article 33 by construing the language "brought, at the option of the plaintiff" to mean the place where the plaintiff may initiate the action, subject to the application of the procedural doctrine of *forum non conveniens* as provided for in subsection (2).[15] It also avoids the need to graft language onto

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[15] *See In re Commissioner's Subpoenas,* 325 F.3d 1287, 1296 (11th Cir. 2003) (noting that "in treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole and read in insolation"); *Itel Containers Int'l v. Huddleston,* 507 U.S. 60, 65-66 (1993) (rejecting an interpretation of an international convention that would render some of its language superfluous); *see also Maximov v. U.S.,* 373 U.S. 49, 54 (1963) (stating that "it is particularly inappropriate for a court to sanction a deviation from

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subsection (2) so that it would read: "Questions of procedure, other than *forum non conveniens,* shall be governed by the law of the court seised of the case" – a result the law plainly does not permit.[16]

Notwithstanding the conclusion that the text unambiguously permits application of the *forum non conveniens* doctrine in Montreal Convention cases, it remains the Court's responsibility to interpret Article 33 consistently with the shared expectations of the contracting parties. *Tseng,* 525 U.S. at 167. Accordingly, the Court considers below whether the

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the clear import of a solemn treaty between this Nation and a foreign sovereign, when . . . there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories").

[16] As early as 1821, the Supreme Court recognized that:

> [T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops – whatever may be the imperfections or difficulties which it leaves behind.

The Amiable Isabella, 19 U.S. 1, 71 (1821); *accord Sanchez-Llamas,* 126 S. Ct. at 2679.

historical context in which the Convention was drafted, the purpose, the drafting history, the post-ratification understanding of the contracting parties, if any, and the meaning accorded to Article 33 by the agencies responsible for its negotiation and enforcement, support the conclusion that *forum non conveniens* may be employed in Montreal Convention cases pursuant to Article 33(4). *Id.*; *Floyd,* 499 U.S. at 534-35; *Sanchez-Llamas,* 126 S. Ct. at 2685.

b. Historical Context

In reaching the conclusion that the plain language of Article 33 permits the application of *forum non conveniens* in Montreal Convention cases, the undersigned acknowledges that subsection (1) and subsection (4) of Article 33 are nearly identical to Article 28(1),(2) of the Warsaw Convention, and that the Ninth Circuit Court of Appeals in *Hosaka,* as well as Lord Phillips in *Milor S.R.L. v. British Airways, PLC,* [1996] Q.B. 702 (Eng. C.A.), concluded that the sentence "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted" in Article 28(2) did not authorize the application of *forum non conveniens* in Warsaw Convention cases. However, the authors of those opinions were seeking to ascertain the shared expectations of the signatories to a treaty that was drafted in 1925 and 1929, at a time when the *forum non conveniens* doctrine was rarely utilized, its contours were undeveloped and its "procedural" character was unsettled. *See Hosaka,* 305 F.3d at 999, n.13, 1002-03; *accord Milor S.R.L. v.*

British Airways, PLC, [1996] Q.B. 702 (Eng. C.A.); *Saks,* 470 U.S. at 401.[17] Therefore, there is little, if any evidence, reflecting that the drafters of the Warsaw Convention then understood that the inclusion of the language "[q]uestions of procedure shall be governed by the law of the court seised of the case" encompassed *forum non conveniens.*

The same conclusion cannot be reached with respect to the Montreal Convention; federal courts in the United States faced with cases arising out of international transactions and mass torts, among others, have utilized the doctrine routinely since 1947 to assess whether litigation should occur in a more convenient foreign forum, including in Warsaw

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[17] As of 1929, when the Warsaw Convention was negotiated, the term "*forum non conveniens*" was not even in use in courts in the United States, although some American courts had recognized the discretion of trial courts to refuse jurisdiction in certain types of cases. *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens,* 35 Cal. L. Rev. 380, 386-89 (1947); Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany,* 16 Loy. L.A. Int'l & Comp. L.J. 455, 460-464. By 1941, Justice Frankfurter referred to the "familiar doctrine of forum non conveniens" as a manifestation of a civilized judicial system which is "firmly imbedded in our law." *Baltimore & O.R. Co. v. Kepner,* 314 U.S. 44, 55-56 (1941) (Frankfurter, J., dissenting). Even then, however, the parameters of the doctrine remained unclear until 1947, when the United States Supreme Court decided *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), and *Koster v. Lumbermens Mut. Cas. Co.,* 330 U.S. 518 (1947). *See Reyno,* 454 U.S. at 248 n.13.

Convention cases.[18] The historical context of the Montreal Convention thus reflects that, by the time it was drafted, the doctrine was widely understood to be a procedural device frequently employed in United States courts. *See generally* 14D C. Wright, A. Miller & E. Copper [sic], Federal Practice and Procedure § 3828 (3d ed. 2007); *American Dredging Co. v. Miller,* 510 U.S. 443, 453 (1994) (noting that *forum non conveniens* is a doctrine of procedure rather than substance). Moreover, *Hosaka* had not been decided in 1999, when the final draft of the Montreal Convention was completed. At that time, the only United States decision that had addressed directly the availability of *forum non conveniens* in Warsaw Convention cases in the United States was the Fifth Circuit's decision in *In re . . . New Orleans,* and it had

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[18] *McLoughlin v. Commercial Airways (Pty) Ltd.,* 602 F. Supp. 29 (E.D.N.Y. 1985) (denying motion); *Harpalani v. Air India, Inc.,* 622 F. Supp. 69 (N.D. Ill. 1985) (denying motion); *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982,* 821 F.2d 1147 (5th Cir. 1987) (en banc) (affirming district court's denial of motion); *Galu v. Swiss Air Transport Co., Ltd.,* No. 86 Civ. 5551, 1987 WL 15580 (Aug. 3, 1987) (denying motion); *Robert Bosch Corp. v. Air France,* 712 F. Supp. 688 (N.D. Ill. 1989) (denying motion); *Lu v. Air China Intern. Corp.,* No. CV 92-1254, 1992 WL 453646 (E.D.N.Y. Dec. 16, 1992) (unreported case granting motion, and agreeing (*id.* at *1 n.1) with the Fifth Circuit's reasoning in *New Orleans* that *forum non conveniens* is applicable to a Warsaw Convention case); *Thach v. China Airlines, Ltd.,* No. 95 Civ. 8468, 1997 WL 282254 (S.D.N.Y. May 27, 1997) (denying motion); *In re Air Crash Off Long Island, N. Y., on July 17, 1996,* 65 F. Supp. 2d 207 (S.D.N.Y. 1999) (denying motion).

held that *forum non conveniens* was available, stating:

> The delegates, however, recognized that the [Warsaw] Convention's provisions would have to be applied and adopted to a variety of legal systems, so they provided in Article 28(2) that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted."
>
> Plaintiffs insist that article 28(1)'s language "at the option of the plaintiff" grants them the absolute and inalterable right to choose the national forum in which their claims will be litigated. We cannot agree. . . . The party initiating the action enjoys the perogative [sic] of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. . . . We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.

In re Air Crash Disaster Near New Orleans, La., on July 9, 1982, 821 F.2d 1147, 1161-62 (5th Cir. 1987) (internal citations and footnotes omitted).[19]

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[19] The Second Circuit also had stated in *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971), that:

> [I]n a Warsaw Convention case there are two levels of judicial power that must be examined to determine

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Viewed in this context, the undersigned cannot agree with Plaintiffs' argument that interpreting Article 33 to allow for application of *forum non conveniens* would be inconsistent with Article 57 of the Montreal Convention prohibiting "reservations." The difficulty with this argument is that it presupposes that the drafters did not understand that *forum non conveniens* is part of the procedural law of the United States and that they did not anticipate that *forum non conveniens* would continue to be employed in United States courts. Neither the text of Article 33 nor its historical context support this pre-supposition for the reasons explained above, and therefore no "reservation" is necessary for a United States court to be able to consider the "procedural question" of whether an action under the Montreal convention should be dismissed pursuant to *forum non conveniens*.

> whether suit may be maintained. The first level . . . is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case – jurisdiction in the domestic law sense. *It is only after jurisdiction in both senses is had that the question of venue is reached and a determination made regarding the appropriateness and convenience for the parties of a particular domestic court.*

Id. at 800 (footnote omitted) (emphasis added); *accord Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1 (2d Cir. 1988); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104-05 (D.C. Cir. 1988).

The Court also is not persuaded by Plaintiffs' argument that the drafters' failure to address the location of the fora to which a case could be "transferred" indicates that they did not intend to allow the application of *forum non conveniens* in United States courts and elsewhere the doctrine is employed. While the drafters may have aspired to achieve uniformity and predictability in the implementation of the Montreal Convention's liability regime, the historical record reflects that the drafters were tasked with harmonizing the conflicting interests of numerous countries with different legal systems, including widely disparate procedural rules. The Montreal Convention, like most treaties, was the product of consensus and the absence of a provision does not necessarily imply anything more than mere compromise. *See, e.g., Franklin Mint Corporation,* 466 U.S. at 262 (Stevens, J., dissenting) (noting that "[t]he great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters").[20]

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[20] That the Montreal Convention was the product of compromise and consensus is evident from the remarks of the Chairman, quoted at page 44, *infra,* in advocating the adoption of a "consensus package" that included the language now found in Article 33.

c. Purpose of the Treaty

Plaintiffs also submit that *Hosaka*'s reasoning respecting the primary purposes of the Warsaw Convention is equally applicable to cases arising under the Montreal Convention. *See* D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 19. In *Hosaka,* the Court found that application of the *forum non conveniens* doctrine would undermine the Warsaw Convention's dual goals of (i) uniformity, and (ii) the balance that the drafters sought to strike between the interests of air carriers and passengers. *See Hosaka,* 305 F.3d at 996-97. In reaching this conclusion, the *Hosaka* Court relied on the *Milor* Court's reasoning, citing with approval the statement that Article 28 of the Warsaw Convention is "a self-contained code" harmonizing different national views on jurisdiction. *Id.* at 997.

Plaintiff's argument fails to take account of the fact that the stated purpose of the Montreal Convention was to "modernize and consolidate the Warsaw Convention and related instruments,"[21] and to "ensur[e] protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." Montreal Convention, Preamble. As such, it was intended to replace the system of liability contained in the Warsaw Convention:

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[21] Namely, the Hague Protocol of 1955, the Guadalajara Supplementary Convention of 1961, the Guatemala City protocol of 1971, and the Montreal Protocols 1-4 of 1975. *See* Montreal Convention, art. 55.

> The Montreal Convention is the product of an effort by the International Civil Aviation Organization, a specialized agency of the United Nations, to reform the Warsaw Convention so as to 'harmonize the hodgepodge of supplementary amendments and inter-carrier agreements' of which the Warsaw Convention system of liability consists. . . . The Montreal Convention is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention. . . .

Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004) (internal citations omitted).[22] Thus, *Hosaka*'s reliance on the purposes of the Warsaw Convention to conclude that *forum non conveniens* dismissals were unavailable in United States courts under the earlier treaty, is not entirely persuasive to

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[22] As noted by President Clinton in his letter of transmittal to the Senate:

> Among other benefits, the Convention eliminates the cap on carrier liability to accident victims; holds carriers strictly liable for proven damages up to 100,000 Special Drawing Rights (approximately $135,000) . . . ; provides for U.S. jurisdiction for most claims brought on behalf of U.S. passengers; clarifies the duties and obligations of carriers engaged in code-share operations; and, with respect to cargo, preserves all of the significant advances achieved by Montreal Protocol No. 4.

S. Treaty Doc. No. 106-45, 1999 WL 33292734, at 8.

this Court which is tasked with deciding the availability of this procedural tool under the new treaty.

Indeed, at least one of the purposes of the Montreal Convention, modernization, actually supports the viability of *forum non conveniens* dismissals in cases arising thereunder. As already noted, at the time the Montreal Convention was drafted, the only case in the United States directly addressing the availability of *forum non conveniens* in cases brought under the Warsaw Convention had found the doctrine to be applicable and other courts had applied the doctrine in Warsaw Convention cases without engaging in treaty interpretation. *See supra* note 18. Also, at least one other foreign court had employed the doctrine in a Warsaw Convention case. *See Brinkerhoff Maritime Drilling Corp. v. P.T. Airfast Servs. Indonesia* [1992] SGCA 45 (available at http://app.supremecourt.gov.sg/default.aspx?pgID=1127 (visited Aug. 28, 2007)). Thus, utilization of the doctrine comported with modern practice at the time the Montreal Convention was negotiated and is consistent with the Montreal Convention's stated goal of "modernization."

Nonetheless, the Court accepts Plaintiffs' assertion that the drafters of the Montreal Convention, like the drafters of the Warsaw Convention, aspired to uniformity and predictability in the implementation of its liability scheme. These goals, however, do not necessarily suggest that the drafters of the Montreal Convention viewed *forum non conveniens* as repugnant or incompatible with its jurisdictional provisions. Although the delegates clearly knew that

United States courts were applying *forum non conveniens* in Warsaw Convention cases, not a single proposal appears in the Minutes of the Conference or related documents precluding the application of *forum non conveniens* in Montreal Convention cases. Instead, the drafting history, explained in greater detail below, reflects that the delegates considered various proposals which would have expressly sanctioned the use of *forum non conveniens* in cases brought in the fifth jurisdiction or clarified its status as a procedural question under Article 33(4); however, no consensus could be reached due mainly to the fear that codification would be interpreted as requiring countries unfamiliar with the doctrine to employ it. The absence of language articulating *forum non conveniens* principles in the final document, thus, suggests that the drafters intended to maintain the status quo: that United States courts, as well as the courts of other States recognizing the doctrine, would continue to apply *forum non conveniens* in Montreal Convention and other cases, while others would not.

Moreover, *Hosaka,* in buying into the *Milor* Court's reasoning that the Warsaw Convention was intended to include a "self contained jurisdictional code" with which *forum non conveniens* conflicted, appears to have overlooked that in the United States the doctrine of *forum non conveniens* has co-existed with the concept of jurisdiction for many decades. In *Smith,* the Second Circuit Court of Appeals explained pelucidly the relationship between jurisdiction and venue in the context of a Warsaw Convention case.

See supra note 19 (citing *Smith,* 452 F.2d 798). *Forum non conveniens* is not a jurisdictional question, but rather a supervening question of proper venue. *See Am. Dredging Co. v. Miller,* 510 U.S. 443, 453 (1994). Therefore, whether under Warsaw or Montreal, the first issue in any case should be whether there is treaty jurisdiction, meaning whether the case has been brought in one of the fora described by the applicable treaty, the second issue should be whether there is subject matter jurisdiction under domestic law, and the third issue should be whether venue is proper and appropriate. *See supra* note 19.

The record also does not reflect that drafters of the Montreal Convention, assuming they understood *forum non conveniens* to be a jurisdictional question, accorded the objective of formulating a "self-contained jurisdictional code" the primacy ascribed in the *Hosaka* and *Milor* opinions to the drafters of the Warsaw Convention. Like the Warsaw Convention, the predominant objectives of the Montreal Convention were the creation of a new uniform system of liability governing the international transportation of passengers and cargo, and the balancing of the interests of the air carriers and passengers. However, when the Warsaw Convention was drafted the doctrine of *forum non conveniens* was undeveloped and rarely invoked. By 1999, its contours had been defined and it had been widely employed in United States courts in international cases, although never

to the detriment of a Warsaw Convention plaintiff in a reported case.[23] In other words, the doctrine did not pose a significant threat to uniform implementation of the Montreal Convention's liability regime. Hence, there were no proposals at the Conference to exclude it as a procedural device.

In any event, the Court simply does not perceive how application of the doctrine, as a practical matter, undermines uniform implementation of the Montreal Convention or the balance it seeks to strike between the interests of the passengers and the airlines. *Forum non conveniens,* as it has developed in the United States, requires, among other factors, that the movant, in order to upset the plaintiff's choice of forum, demonstrate the existence of an "adequate alternative forum" that has a paramount private and public interest in the case. *See Reyno,* 454 U.S. at 255 n.22, 257-261; 14D C. Wright, A. Miller & E. Copper [sic], Federal Practice and Procedure §§ 3828.3, 3828.4 (3d ed. 2007). Since treaty jurisdiction can be established only in one of the fora described in Article 33 (*see, e.g., Smith,* 452 F.2d at 802-03), it is difficult to conceive of a dismissal based on *forum non conveniens* in a Montreal Convention case in a United

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[23] *See supra* note 18. In an unreported case, the district court for the Eastern District of New York dismissed a case arising under the Warsaw Convention on the basis of *forum non conveniens,* agreeing with the Fifth Circuit's reasoning in *New Orleans* that the doctrine is applicable to a Warsaw Convention case. *See Lu v. Air China Int'l. Corp.,* No. CV 92-1254, 1992 WL 453646, at *1 n.1 (E.D.N.Y. Dec. 16, 1992).

States court unless the alternative forum is (i) authorized to hear the case pursuant to Article 33(1) or (2), and (ii) demonstrably the more appropriate venue.

Further, a decision to dismiss in favor of one of the fora designated by Article 33 would not appear to upset the balance the drafters of the Montreal Convention intended to strike between the interests of the passengers and the airlines. The requirements to invoke the fifth jurisdiction show that the drafters concluded that plaintiffs should have the initial choice of forum, but that the choice should be constrained to ensure litigation in a location with a significant connection to the defendant.[24] The doctrine of *forum non conveniens*, as established in the United States, is consistent with that balance by requiring that a court defer to plaintiff's choice of forum in assessing whether one of the other fora would be more

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[24] For a plaintiff to invoke a Convention State as the fifth jurisdiction: (1) there must be damage resulting from the death or injury of a passenger, (2) the State must be the "principal and permanent residence" of the passenger at the time of the accident, (3) the State must be one to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a "commercial agreement," and (4) the State must be one in which the carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a "commercial agreement." *See* Montreal Convention, art. 33(2)-(3); *see also generally* Devendra Pradhan, *The Fifth Jurisdiction Under the Montreal Liability Convention: Wandering American or Wandering Everybody?*, 68 J. Air L. & Com. 717 (2003) (discussing the adoption and potential impact of the fifth jurisdiction).

appropriate in a case arising under the Convention. *See Reyno,* 454 U.S. at 255; *but see id.* at n.23 (noting that although not dispositive, citizens or residents deserve "somewhat more deference" than foreign plaintiffs); 14D C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828.2 (3d ed. 2007).

Finally, *forum non conveniens* encourages uniform implementation of the liability system and consistency of results because it facilitates the consolidation of multiple lawsuits arising out of a single air disaster in a single forum state.

d. Drafting History

Plaintiffs argue that the drafting history of Article 33 is inconclusive with respect to the applicability of *forum non conveniens* in Montreal Convention cases: "The only clear and verifiable truth is that ultimately, the Montreal Convention, like its predecessor says nothing about the FNC doctrine." D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 24. The undersigned disagrees. While it is certainly true that the Montreal Convention does not expressly refer to the doctrine of *forum non conveniens,* it was a subject of extensive discussions in connection with the inclusion and drafting of the fifth jurisdiction that in the final instrument appears in Article 33(2). Those discussions show that no consensus could be reached for the inclusion of express language codifying the doctrine, but they also show no inclination on the part of the delegates to restrict existing practices among the

signatory States. Importantly, the Minutes of the Conference and related documents contain not a single proposal that would prohibit the courts of Convention States from employing *forum non conveniens*.

The discussion of *forum non conveniens* began in the Conference meetings in response to the proposal, supported by the United States, that the convention include a fifth jurisdiction allowing passengers or their heirs to sue in the state where the passenger lived. In supporting the proposal, the United States had anticipated that the addition of the fifth jurisdiction would aid in addressing the problem of "forum shopping" in the United States: "U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction." D.E. 151 (Conventional Filing of the Conference Minutes and Documents (hereinafter "Minutes" or "Documents"))[25] at 108 (DCW Doc. No. 12 ("forum shopping" aspect of paper presented by the U.S. titled "Article 27 – Fifth Jurisdiction")).[26] The United States also had provided

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[25] The Minutes and Documents are published by the International Civil Aviation Organization, Doc. 9775.

[26] The United States advocated for the addition of the fifth jurisdiction, noting, *inter alia*, that it was "a matter of fundamental fairness;" U.S. citizens had been prevented from filing suits in U.S. courts in a number of Warsaw Convention cases due to the unavailability of a fifth jurisdiction. *Id.* at 104. It was the view of the United States that passengers or heirs with

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a position paper to the Conference for its consideration in the adoption of the fifth jurisdiction explaining the operation of the doctrine of *forum non conveniens* in United States courts. *Id.* at 151-54 (DCW Doc. No. 27 (paper presented by U.S. titled "Two Cases Reflecting United States Law on Forum Non Conveniens")). In the paper, the United States had explained "[t]he primary purpose of *forum non conveniens* is to allow a court to resist impositions upon its jurisdiction and to protect the interests of parties to the litigation by adjudicating the claim in the most suitable and convenient forum. A forum is suitable and convenient when the entire case and all the parties come within the jurisdiction of that forum." *Id.* at 154.

The Minutes of the Conference meetings from May 17, 1999, reflect that the French delegate opposed the creation of a fifth jurisdiction because he was concerned that its inclusion would both encourage forum shopping in high compensation states and make it easier for courts applying *forum non conveniens* to dismiss foreign plaintiffs' claims in favor of courts located in poorer countries. *See* Minutes at 103-04, paras. 44-45.[27] The United States delegate

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claims arising under the new convention "should have the right to bring suit in the courts of the State where the passenger lived." *Id.* at 101.

[27] The French delegate's views were endorsed by the delegates from Madagascar, India, Lebanon, Saudi Arabia, Lesotho, Cameroon, Korea, China and Gabon. *Id.* at 105, para. 49. More importantly, the French delegate's statements reflect that he

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responded that he disagreed that inclusion of the fifth jurisdiction would increase forum shopping since he anticipated that the increase in the number of cases brought in the United States due to the fifth jurisdiction [*i.e.*, by U.S. residents] would be offset by the number of cases that would be dismissed on *forum non conveniens* grounds due to the availability of a "home court" convenient forum for a "forum shopping" plaintiff. *Id.* at 108, para. 62. He further suggested that the French delegate's concern that foreign plaintiffs would be consigned to litigation in their home countries through the application of *forum non conveniens* was not well-founded because, under the proposal, the fifth jurisdiction could not serve as an alternative forum unless it was both the principal and permanent residence of the passenger and a location where the carrier had a significant commercial presence. *Id.* at 108-09, paras. 63-64.

On May 19, 1999, the discussions respecting the fifth jurisdiction and *forum non conveniens* continued. The Minutes reflect, among other comments on the doctrine, that the Swedish delegate indicated that he would welcome the inclusion of any language that would authorize States to continue to apply *forum non conveniens* but would oppose any effort to impose the doctrine on others. The Minutes show that he commented as follows:

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anticipated that *forum non conveniens* dismissals would remain a possibility in some countries under the proposed jurisdiction.

> With reference to draft Article 27 [*i.e.*, Article 33 in the final instrument], the Delegate of Sweden recalled that reference had been made to the possibility of provisions on *forum non conveniens* and his Delegation welcomed any such wording that would enable States presently applying that principle to continue doing so. However, he advised against any attempt to make that a standard provision for all States. It had been proposed, through lengthy discussions in other fora, that it should be a standard requirement applicable to all States, although no conclusions had been reached at this point in time. He stated that *forum non conveniens* was unknown to most civil law countries and a number of States had firm instructions on such a position.

Id. at 144, para. 18.

The fifth jurisdiction and *forum non conveniens* were also considered later that day in the "Friends of the Chairman" Group.[28] In that meeting, the Chairman offered two ideas for further consideration in addressing fears that there would be a tendency for plaintiffs to favor a fifth jurisdiction "home base" as being more favorable to them "even in circumstances in which the critical connecting links between the passenger, the accident and the injury might be such that that forum could be regarded as an inconvenient

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[28] For a listing of the Group's members, *see* Minutes at 109, para. 66.

forum. . . ." *Id.* at 148-49, paras. 6-7. The first idea concerned the possibility of codifying *forum non conveniens* within Article 27 so that a court seized of a case "would not be able to exercise its jurisdiction in circumstances in which it would be inconvenient or would create formidable difficulties, having regard to the connecting links of the case." *Id.* The second idea was to consider the first four bases of jurisdiction as primary, and if a plaintiff resorted to the fifth jurisdiction, he would have to show that it would be highly inconvenient or disadvantageous for him to resort to the existing four jurisdictions. *Id.*

In the context of these discussions, the Australian delegate proposed that Article 27 might be made subject to a provision requiring a court to be satisfied that it would be "manifestly unfair to permit the matter to be heard and decided in that jurisdiction and that there existed another jurisdiction in which the matter might properly, and with a view to the interests of all the parties, more fairly and conveniently heard and decided, in which case the Court might dismiss the matter." *Id.* at 158, para. 17. The Chairman understood the proposal to be applicable to only the fifth jurisdiction: "The substance of the proposal was that a resort to the fifth jurisdiction would place a responsibility on the plaintiff to satisfy the Court on two counts: that there was not another jurisdiction in which the matter might properly, and with a view to the interests of all the parties, more fairly and conveniently be heard and decided; and that it would be manifestly unfair in all the

circumstances for the matter to be heard and decided in that jurisdiction." *Id.*, para. 18. The proposal as formulated by the Chairman was tentatively endorsed by the delegates from Saudi Arabia and Canada, with the Minutes reflecting that the Canadian delegate observed that "while the doctrine of *forum non conveniens* might have elaborated originally in common law jurisdictions, it was now spreading throughout the world and was taken into account in modern Civil Codes, such as the new Quebec Civil Code" and that the "doctrine was entirely compatible with civil law systems. . . ." *Id.* at 158-59, para. 19.

The United States delegate underscored in his response that his delegation was unalterably opposed to any provision that would create a higher hurdle for the application of the fifth jurisdiction than would be applicable to the other four jurisdictions, as would be the case if only the fifth jurisdiction was made subject to *forum non conveniens* analysis. *Id.* at 159, para. 21. The United States delegate further made clear that, regardless of the action ultimately taken by the Conference on the issue of *forum non conveniens,* the United States would continue to apply the doctrine in any and all Convention cases in its courts. *Id.* The Minutes recount his comments as follows:

> Indicating that he [*i.e.*, the U.S. delegate] was somewhat puzzled by the direction which the debate had taken, he noted that DCW Doc No. 27 presented by his Delegation described the doctrine of *forum non conveniens* as it was currently applied in the

Courts of the United States to the existing four jurisdictions and as it would be applied to a fifth, sixth, seventh or eighth jurisdiction, if such jurisdictions were created. The Delegate of the United States noted that the doctrine of *forum non conveniens* would be applied to all five jurisdictions in his country whether the Group prescribed that or not. It seemed to him that that should provide substantial comfort to those concerned about judgments in his jurisdiction. The Delegate of the United States was concerned not only about not creating a higher hurdle for the application of the fifth jurisdiction than existed for the other four jurisdictions but also about the ratifiability of the new Convention. As has already been noted, there were jurisdictions which did not apply, understand or perhaps even desire *forum non conveniens*. He was concerned that, by proposing to impose such an alien concept on such jurisdictions, it would make it more difficult for them to accept the result. The Delegate of the United States was also concerned that, in attempting to codify on paper a doctrine which already existed in his country, the Group would do it in a way which would alter the jurisprudence which was already applicable in the United States and that such an alteration would be found to be obnoxious to the process which the Group had to follow.

The Delegate of the United States thus suggested that, to provide some measure of comfort to those concerned about the level of

> judgments in his jurisdiction and perhaps to others where *forum non conveniens* or similar doctrines which perhaps did not bear that precise name were applicable and to avoid any concern that by having the fifth jurisdiction, some Court would conclude that the *forum non conveniens* doctrine should not be applied, paragraph 4 of Article 27 ("Questions of procedure shall be governed by the law of the Court seised of the case.") should be amended by adding the phrase "including the doctrine of *forum non conveniens* or other similar doctrines". If any Delegate had such a similar doctrine that had a name, it could be included in that provision. The Delegate of the United States hoped that with his proposed amendment a certain degree of comfort might be gained without, as in the adage, throwing away the baby with the bathwater.

Id., paras. 21-22.

Consistent with his remarks, it was also observed by other delegates that the *forum non conveniens* doctrine was relatively unknown in some European countries (*id.*, para. 20 (Swiss delegate's comment in this respect)), would be difficult to harmonize within some countries' legal systems (*id.* at 160, para. 26 (Chilean delegate's comments respecting Chile and several other unidentified Latin American countries)), and in fact, in an apparent reference to *Milor*, that the doctrine was inapplicable in England in cases arising under the Warsaw Convention. *Id.* at 161-62, paras. 31, 33.

In the course of these discussions the Conference Chairman questioned whether in the interest of achieving predictability and uniformity, it might be necessary to forge a common understanding of *forum non conveniens*. *Id.* at 159-60, para. 23; 162, paras. 32, 34; *also* 171, para. 15; 181, para. 28. The Minutes present the following account:

> To the point raised by the Delegate of the United States that the imposition of that alien concept – a term which he found strange – might pose jurisdictional problems, the Chairman emphasized that the Group was involved in the process of seeking uniformity. . . . Recognizing, as he did, that in some jurisdictions the concept of *forum non conveniens* might not exist in a particular form, as well as that many of the elements of the Convention relating to the burden of proof, what was required to be proved and the limits of liability also did not exist in the domestic legislation of many countries, the Chairman indicated that it would be necessary to make adjustments to such legislation in order to achieve uniformity. He therefore appealed to the Group to search for solutions which were commonly acceptable, even in the knowledge that they might entail adjustments to domestic jurisdictions.

Id. at 159-60, para. 23. The Chairman further noted that "the Group would need to look most carefully as to whether or not in all the circumstances it would be achieving its purposes if it did not expressly provide

for [*forum non conveniens*] in the Convention. It would seem that if *forum non conveniens* was to play a role, that would have to be clearly indicated, having regard to the jurisprudence which might or might not exist in some countries." *Id.* at 161-62, paras. 31-32.

Next, the Minutes reflect that the delegate from the United Kingdom, apparently referring to the *Milor* decision, indicated that "[i]t did not seem to him that the Group would really be modernizing and consolidating the Warsaw Convention if the Group were to make it necessary for the plaintiff to fight for his existing right to bring his action at the place of his choice and to leave a decision thereon to the Court." *Id.* at 162, para. 33. In response:

> The Chairman indicated that the last two comments had left him in a state of some confusion: the Delegate of the United Kingdom had stated that in his jurisdiction, it was the option of the plaintiff to determine which of the four jurisdictions would apply and that the principle of *forum non conveniens* had been determined not to apply; it had also been indicated that it was desirable to add a fifth jurisdiction and to circumscribe its application so as to ensure that the mischief that was perceived by many to exist in relation to that jurisdiction might indeed be fenced in. Averring that the Group could not have it both ways, he considered that if the Group did recognize that it gave rise to such mischief, then either it would determine that the fifth jurisdiction had its

peculiar problems and that it therefore might be desirable to put fences in appropriate places to deal with those problems, or it would recognize that all of the jurisdictions would be subject to a *forum non conveniens* rule and, to that extent, would modify even the existing Convention rules. If, as indicated by the Observer from the IUAI, there were no cases in the United States in which the principle of *forum non conveniens* had been applied to Convention cases, then it would indicate the importance of dealing with that as an issue, certainly in relation to the fifth jurisdiction. If it were to be dealt with in relation to the other jurisdictions, then it would have to be done on the basis that the rules were being changed or clarified so that there would be uniformity in the application of the rules across the whole spectrum of jurisdictions. The issue which the Group would have to decide upon was whether it was fair to circumscribe the conditions under which the fifth jurisdiction would be exercisable, in the knowledge that concerns had been expressed and in the hope that the Group would be able to deal with the question of how to achieve uniformity and a degree of universality in dealing with the issue. The suggestion had been made that perhaps it could be dealt with under paragraph 4 of Article 27, in which questions of procedure were governed by the Court seised of the case, and that that could be elaborated upon in dealing with the introduction of the basic parameters of *forum non*

> *conveniens*. However, if, in light of what had just been said, it were dealt with in paragraph 4, which was of general application to all of the provisions contained in Article 27, then it would apply to all jurisdictions.

Id., para. 34.

The Minutes show that the delegate of Singapore next remarked that:

> [O]ne possible, logical interpretation of paragraph 1 of Article 27 would be that the plaintiff had the option of bringing his action for damages in one of the four jurisdictions indicated. It was up to him to make the choice. The rules in that chosen jurisdiction would accordingly apply to him. He observed that the doctrine of *forum non conveniens* was a common law doctrine which would apply in all cases unless there were a statutory provision against it. Thus all that the expression "at the option of the plaintiff" meant was that it was for the plaintiff to decide in which jurisdiction to bring his action. Even if he did not succeed in having his case heard in the first jurisdiction so chosen, nothing would prevent him from bringing his action in one of the other jurisdictions. Thus even if that expression were retained, the action would be initiated and the preliminary question of whether the jurisdiction chosen by the plaintiff was the most appropriate forum would be overcome. The case would then proceed.

Id. at 162-63, para. 36.

The Group returned to the discussion of Article 27 and the "fifth jurisdiction" during May 20-21, 1999, considering proposed language specifying that a court could decline jurisdiction in certain circumstances where a plaintiff filed her action in the fifth jurisdiction. *Id.* at 167, para. 1; 170-71, paras. 13-17; Documents at 491 (DCW-FCG No. 1, "Draft Consensus Package"), art. 27(4).[29] Upon inquiry from the Swiss delegate on whether the language under consideration contained the same elements as when one spoke about *forum non conveniens,* the Minutes reflect that the Chairman explained:

> [T]he concept of *forum non conveniens* was a concept which allowed the court to make a determination that it was inappropriate for a matter to be brought in a certain forum, having regard to a variety of considerations.

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[29] The language under consideration provided in pertinent part:

> 4. Questions of procedure shall be governed by the law of the Court seised of the case. The court may decline to exercise jurisdiction on the basis of the additional jurisdiction set out in paragraph 2 of this Article [*i.e.*, the fifth jurisdiction], if the carrier proves
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> a) that having regard to the circumstances of the accident and the issues to be determined it would place too onerous a burden on the carrier for the case to be heard and determined in that jurisdiction, and
>
> b) there exists another jurisdiction in which the case may be properly, and with a view to the interests of all the parties, more fairly and conveniently be determined.

> The considerations which were outlined in Article 27 were indicative of those which a court could properly take into account. Subparagraph b) of paragraph 4 addressed also the need to highlight the fact that it was not enough to say that it was an inconvenient forum; it was necessary to also show that there was access to another forum which was more convenient. The Chairman was not certain that in some jurisdictions, apart from indicating that a forum was not convenient, a court would in fact go further and indicate where a more convenient forum could be found. Recognizing, therefore, that the Convention itself established other bases for jurisdiction, it then became necessary to examine the other bases in order to determine whether or not there was another convenient forum. The Chairman therefore regarded paragraph 4b) of Article 27 as being appropriate because the Convention delineated the forum. It was correct that the provision covered more than the *forum non conveniens* mentioned in Article 28, paragraph 4. The fact remained, however, that different jurisdictions applied, with different rules in the application of *forum non conveniens*. What the Conference was attempting to do was provide a Convention rule.

Minutes at 174, para. 28.

The delegate of the United States voiced his opposition to the draft *forum non conveniens* provision, again, because it limited the fifth jurisdiction in a

manner not applicable to the other four jurisdictions; in his view the provision would be counter-productive to the notion that the fifth jurisdiction would help minimize "forum shopping," as he had suggested in initially supporting its addition. *Id.* at 180, para. 24. Thus, the delegate from the United States suggested that the provision should be clarified to state that it was not intended "to limit the ability of courts, in their discretion, applying the law of the court seised of the case to dismiss cases that more properly belonged in one of the other jurisdictions." *Id.* The Chairman requested the United States delegate to provide his proposal in writing. *Id.*, para. 25. The Swedish delegate expressed support for the clarification proposed by the United States delegate because, in conjunction with the language that "questions of procedure shall be governed by the law of the court seised of the case," the clarification would be consistent with an interpretation that States that currently applied *forum non conveniens* could continue to do so, while not making it mandatory for States that did not apply the doctrine to insert it into their national laws, thus presenting problems of ratifiability. *Id.* at 181, para. 27; *see also* para. 29 (European Community Observer echoing Swedish delegate's comments, noting that *forum non conveniens* was "foreign to the legal system in a large number of courts" and that "[i]f it was to go in, it would have to do so in a very careful manner, perhaps in the way that had been suggested").

The Swiss delegate then summarized his understanding of the *forum non conveniens* doctrine, noting that it is a matter of procedural, not substantive law. *Id.* at 181-82, para. 30. He also observed that the doctrine had been said to apply differently in different legal systems, and that it was unknown in his country, where a court had to take every case in which there was jurisdiction. *Id.* Thus, the Swiss delegate proposed maintaining the language of Article 28(2) of the Warsaw Convention – "[q]uestions of procedure shall be governed by the law of the Court seised of the case" – and not the additional language under consideration that was intended to apply only to cases brought in the fifth jurisdiction. *Id.*, paras. 30, 34. The Swiss delegate was of the view that the additional language would not enhance the Conference's efforts to unify the law. *Id.*, para. 32. Specifically, he noted that the mandatory language of Article 27(4) (*i.e.*, "questions of procedure *shall be governed* by the law of the court seised of the case") allowed a court to examine the *forum non conveniens* issue, whether the parties argued it or not, in those jurisdictions in which the doctrine was observed, while the proposed additional language would introduce the concept, albeit as a discretionary tool, even in jurisdictions like Switzerland that did not apply the doctrine. *Id.*, paras. 30-33. Citing the uncertain treatment that the proposed language would receive in States where the doctrine was not part of the local law, the Swiss delegate suggested that "[t]he Conference should not try to unify one special element of procedure by adding an unclear rule in the

Convention." *Id.*, paras. 33, 34. Thus, the Swiss delegate was of the opinion that the wording of Article 28(2) of the Warsaw Convention should be maintained and that the additional proposed language should be deleted. *Id.*, para. 34.[30]

The Minutes reflect that by the conclusion of the Group's meetings, the Chairman had come to believe that if the treaty expressly allowed for the application of *forum non conveniens* by those States employing the doctrine, its inclusion would not undermine the delegates' efforts to unify and codify the liability regime of the Montreal Convention. They contain the following account of the Chairman's closing comments respecting *forum non conveniens*:

> In relation to what was contained in paragraph 4 of Article 27 in dealing with the question of *forum non conveniens*, there had been a rather intensive discussion as to the place it could occupy, having regard to the different jurisprudential bases of the civil law and common law systems in particular, and that *forum non conveniens* was a foreign concept in some jurisdictions. Indeed, there was the view that in those countries which did not recognize the concept there would be

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[30] Whether as a result of this Swiss delegate's suggestion, or for other reasons not reflected in the Minutes, the final instrument maintains the language of Article 28(2) of the Warsaw Convention, and not the additional language then under consideration. *Compare* Warsaw Convention, art. 28(2), *with* Montreal Convention, art. 33(4).

> problems of ratification. Without prejudice to the legitimacy of the questions as to whether or not an injustice could be brought about by persons who would seek to resort to an inconvenient jurisdiction and in the search for uniformity and codification of law, *the Chairman indicated that the suggestion made by the Representative of the United States, to indicate that it would be enough to indicate that nothing in this article is intended to limit the ability of the court seised of the case to dismiss cases which could more properly belong to another of the jurisdictions stated in the Convention, would in fact preserve the right of those States which had the forum non conveniens principle and in no way derogated from those who did not have it. It would leave the door open to the latter to think in the future as to whether it may well be appropriate to change their own law if they so wished.*

Id. at 183-84, para. 38 (emphasis added). According to the Minutes, this was the last time the "Friends of the Chairman Group" met; the Conference then proceeded with meetings of the "Commission of the Whole" and "Plenary" meetings. *Id.* at iv-vii (Table of Contents).

Thereafter, in his report to the Commission on Friday, May 21, 1999, the Chairman described the status of the negotiations regarding the codification of *forum non conveniens* in Article 27 as ongoing. According to the record of proceedings, he reported:

> *There had also been intense discussion on the question of forum non conveniens;* i.e. whether or not in relation to the jurisdiction provided by the Convention it might be possible to find any appropriate language which would assist in the elimination of the practice of "forum shopping", whereby people would go to what they considered to be the jurisdiction in which they would be able to get the best result. This matter had arisen primarily in articulation of the fifth jurisdiction, although it might well be appropriate to other jurisdictions. *Suggestions made in this connection would have sought to require the court to determine whether or not it was a convenient jurisdiction. Those discussions had remained somewhat inconclusive, although the Chairman was encouraged by the fact that the Conference had reached a stage of its discussions where specific suggestions for addressing specific problems were now being made.* Therefore, to the extent that delegations had problems, it was expected that they would make specific proposals to resolve those problems rather than simply assert that the problems existed.

Id. at 187, para. 9 (emphasis added). The Chairman indicated that consultations would continue bilaterally and across delegations during the weekend, and that he expected that a revised draft of the language under consideration would be available on Monday, May 24, 1999. *Id.*, para. 10. However, the drafts circulated during this time reflect that all language related to the *forum non conveniens* principle had

been deleted from consideration by May 24, 1999. *See* Documents at 495-502 (Revisions to DCW-FCG No. 1, "Draft Consensus Package"), art. 27.

Late on Tuesday, May 25, 1999, the Chairman presented the consensus package that included Article 27; it did not contain *forum non conveniens* language. *See* Minutes at 199, para. 1; Documents at 271 (DCW No. 50, "Consensus Package"), art. 27.[31] In

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[31] Article 27 of the consensus package provided:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(Continued on following page)

advocating approval of the package as a whole, "[t]he Chairman reiterated that the consensus package was to be seen in the context of the Group's having exhausted all possible means of arriving at consensus. It had done so on the basis of the widest possible consultations, of taking into account the concerns of all, of recognizing that no Delegation would find it an ideal solution to all its States' problems." Documents at 205, para. 17. The Chairman further noted that:

> While it was not possible to solve the problems of the world in one Conference, the Conference could make a beginning, an important step forward which would lead to something which would be a significant advance on that which the Conference had. The Conference could do so in recognition of the fact that the consequences of a failure to make a beginning would be far more disastrous that [sic] not accepting a package of this kind. Recalling that he had presented the package as being indivisible, the Chairman indicated that it was because he firmly believed that the Conference had a unique opportunity, a unique challenge, to

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(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger may be considered as a factor, but shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the Court seised of the case.

> lay better foundations for the liability régime in respect of the carriage of passengers, baggage and cargo, and that if it allowed that opportunity to pass, the consequences would be far worse than accepting a package in this form. The Chairman thus commended the consensus package of the Conference for its acceptance as a whole. He implored that it be accepted as all possible means had been exhausted. He affirmed that history would not forgive the Conference if it lost this opportunity.

Id.

The consensus package was adopted (*id.* at 206, para. 19), and the final instrument, which was ratified by the United States Senate on July 31, 2003, contains substantially the same language from the package,[32] renumbered as Article 33.

What the preceding drafting history shows is that no State advanced a proposal which if adopted would have precluded the application of *forum non conveniens* to Montreal Convention cases in the courts of States adhering to the doctrine. Instead, it shows that the doctrine was extensively discussed,

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[32] The only difference between Article 27 in the consensus package and Article 33 in the final instrument is the deletion of the following italicized language in the final instrument: The nationality of the passenger *may be considered as a factor, but* shall not be the determining factor in this regard. *Compare* supra note 31, *with* Montreal Convention, art. 33(3)(b), quoted *supra* p. 16-17.

mainly with respect to the creation of the fifth jurisdiction, that proposals addressing the doctrine were advanced, including proposals which would have made *forum non conveniens* applicable only to the fifth jurisdiction or clarified its applicability to all jurisdictions, and that the United States actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention and other international cases. In the end, the consensus among the delegates was to omit any language respecting the applicability of *forum non conveniens* to avoid imposing the doctrine on States that do not employ it and distorting its application in States where it is commonly employed. In other words, the delegates determined to maintain the status quo: signatory countries employing the doctrine would continue to do so pursuant to subsection (2): "Questions of procedure shall be governed by the law of the court seised of the case," and signatory countries that do not employ the doctrine would not be required to adjust their legal systems to accommodate the doctrine in cases arising under the Convention.

d. [sic] **Post-Ratification Understanding**

Plaintiffs concede the absence of any post-ratification history reflecting the signatories understanding whether *forum non conveniens* would continue to be applicable in Montreal Convention cases

brought in States adhering to the doctrine. *See* D.E. 101 (Pls.' Mem. in Opp'n to Mot.) at 24. Nonetheless, Plaintiffs argue on the basis of representations made by the Executive Branch to the United States Senate to secure ratification of the Montreal Convention that "(1) preserving the right of U.S. Courts to apply [*forum non conveniens*] was *not* a central concern, and (2) the jurisdictional provisions of the Montreal Convention give plaintiffs a *right* to pursue their claims in the enumerated forums." *Id.* at 24-25 (emphasis in original)

In support of their first point, Plaintiffs quote testimony of John R. Byerly, Deputy Assistant Secretary for Transportation Affairs, to the Senate Foreign Relations Committee, in which he stated that the United States delegation achieved "all of America's core objectives" and that "[t]he Convention contains all of the key provisions sought by the United States at the outset of the negotiations." *Id.* at 25 (citing http://www.state.gov/e/eeb/rls/rm/2003/21869.htm). These statements do not show that the United States relinquished *forum non conveniens* in the negotiations for the Convention. Moreover, Plaintiffs omit to acknowledge that Mr. Byerly also stated that "prior judicial interpretations under [the Warsaw Convention] are expected to have continuing validity." At the time of these remarks, the Ninth Circuit's *Hosaka* decision stood in opposition to the Fifth Circuit's decision in *In re . . . New Orleans,* and the Southern District of New York's decision in *In re . . . Long Island.* Therefore, Byerly's remarks do not demonstrate that the

United States or any other signatory State understood at the time of ratification that *forum non conveniens* was precluded in Montreal Convention cases.

As to the second point, Plaintiffs quote the following testimony of Jeffrey Shane, Under Secretary for Policy in the U.S. Department of Transportation:

> A second major passenger benefit provided by the Montreal Convention is the *right* of claimants to bring action in a forum related to the passenger's principal and permanent residence. *This provision will ensure in the vast majority of cases that an injured American passenger or a claimant on behalf of a deceased American passenger will be able to bring action in a U.S. court.*

Id. at 25 (quoting S. Exec. Rpt. 108-8, at 13) (emphasis added by Plaintiffs). Plaintiffs also point to Deputy Secretary of State Strobe Talbott's letter of submittal to President Clinton:

> [T]his fifth jurisdiction provision should ensure that nearly all U.S. Citizens and other permanent residents of the United States have access to U.S. Courts to pursue claims under the convention.

Id. (quoting S. Treaty Doc. No. 106-45, 1999 WL 33292734, at 15-16). According to Plaintiffs, these statements "would have been singularly misleading if they harbored an unstated belief that the new "right" to file in the U.S. was qualified by the airlines' "right" to secure prompt dismissals on [*forum non conveniens*] grounds." *Id.* But these statements are not

untrue or misleading. The fact is that in most cases, United States citizens and permanent residents will be able to maintain actions under the Montreal Convention in United States courts because United States citizens enjoy significant deference in their choice of forum under the *forum non conveniens* doctrine[33] and because, as required by Article 33(2), the fifth jurisdiction, most airlines operate or conduct business in the United States either directly or through a commercial agreement with another carrier.

e. Position of the United States

"Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *See Avagliano,* 457 U.S. at 184-85; *accord Sanchez-Llamas,* 126 S. Ct. at 2685. That understanding is contained in the Statement of Interest filed in this case pursuant to 28 U.S.C. § 517, by attorneys from the United States Department of Justice, with attorneys from the Department of State and the Department of Transportation appearing as of counsel. *See* D.E. 116 (Statement of Interest of the United States).

The Statement of Interest makes clear that the United States did not relinquish the ability of its

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[33] *See Reyno,* 454 U.S. at 255; 14D C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828.2 (3d ed. 2007).

courts to apply *forum non conveniens* in Montreal Convention cases because it and its component agencies are often named in suits arising under the Convention and because the United States has a significant interest in avoiding forum shopping and congestion in its courts when a foreign forum provides a more just, convenient and suitable alternative. Accordingly, the United States understands the text of Article 33(4) to mean that the Montreal Convention "defers to the forum's laws on all questions of procedure and manifests an intent by the drafters not to alter the judicial system of any country on questions of procedure." *Id.* at 3. In this regard, the Statement of Interest also points, persuasively, to the Supreme Court's statement in *Beard*, 523 U.S. at 375, that "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in the State." *Id.* at 3 n.3. Because the Montreal Convention does not expressly preclude application of the doctrine and because the doctrine is a well-established rule of procedure, *forum non conveniens* is applicable in Montreal convention cases.

The United States also emphasizes that when the Montreal Convention was drafted, *Hosaka* had not been decided; therefore, the drafters understood that *forum non conveniens* was accepted procedure in some States, including the United States, and that it would be applied under the Montreal Convention; for

that reason, no clarifying amendment to Article 33(4) was necessary. *Id.* at 4-5.

Conclusion

Based on the foregoing, this Court finds that Newvac is a "contracting carrier" pursuant to Article 39 of the Montreal Convention and that the doctrine of *forum non conveniens* is applicable in this proceeding pursuant to Article 33(4) of the Montreal Convention: "Questions of procedure shall be governed by the law of the court seised of the case." The parties shall now proceed to brief the issue of whether these cases should be dismissed on the ground of *forum non conveniens* in accordance with the schedule established at the status conference held on September 7, 2007.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of September, 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES
DISTRICT JUDGE

copies provided:

counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, S.A., *et al.*,

Defendants. /

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF FOR [sic] FORUM NON CONVENIENS

(Filed Nov. 13, 2007)

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*. D.E. 159. The Court has considered the Motion and is otherwise fully advised in the premises.

a. Facts

These consolidated actions arise out of the August 16, 2005 airplane crash in Venezuela of West Caribbean Airways flight 708, while en route from Panama to Martinique. Plaintiffs are, and the decedents were, residents of Martinique, a Department of the Republic of France. *See* D.E. 152 (Am. Compl.) at ¶¶ 7, 74.[1]

[1] It is undisputed that all but one of the decedent passengers were French nationals. *See* D.E. 159 (Mot.) at 2. This one decedent was an Italian national residing in Martinique. *Id.* n. 3.

Defendant West Caribbean Airways, S.A. is a Colombian corporation with offices in Medellin, Colombia. *Id.* at ¶ 9. Defendants Newvac Corporation and Go 2 Galaxy, Inc. are Florida corporations. *Id.* at ¶ 15.[2]

On March 15, 2005, Newvac entered into a "charter contract" with West Caribbean Airways in Medellin, Colombia, pursuant to which West Caribbean was to provide a 152-passenger MD-81 aircraft and crew, for charter flights occurring during May, July and August 2005. *See* D.E. 99 (McCune Decl.), Ex. "5" (English translation of Charter Contract, originally in Spanish, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Thereafter, on April 25, 2005, Newvac entered into a "contract for air chartering" with Globe Trotter Agency, a travel agency in Martinique, whereby Newvac agreed to provide the aircraft it chartered from West Caribbean to Globe Trotter for a series of excursions between Martinique and Panama. *See*

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[2] The Galbert Plaintiffs sued an additional Defendant, Aseguradora Colseguros, S.A., a Colombian corporation alleged to be the liability insurer of the aircraft at issue. *See* D.E. 152 (Am. Compl.) at ¶ 16. On March 7, 2007, Plaintiffs moved for a 120-day extension of time within which to serve Aseguradora Colseguros. *See* D.E. 38 (Mot.). The Court granted Plaintiffs' Motion. *See* D.E. 51 (Order). The 120-day extension of time expired on or about July 6, 2007, and Plaintiffs neither moved to extend the deadline nor filed proof of service on this Defendant. *See* Fed. R. Civ. P. 4(1). Therefore, the Court dismisses Aseguradora Colseguros without prejudice due to Plaintiffs' failure to effect service of process within the time allotted by the Court's Order. *See* Fed. R. Civ. P. 41(b).

D.E. 99 (McCune Decl.), Ex. "7" (English translation of Charter Contract, originally in French, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Newvac also provided Globe Trotter with the hotel, transportation and "sightseeing" for these excursions. *See* D.E. 145 (Cimetier Depo.) at 185:6-186:4. One hundred fifty two (152) passengers and eight (8) crew members were killed while on one of the excursions sold by Globe Trotter when West Caribbean's aircraft crashed over Venezuela on a return trip from Panama. *See* D.E. 152 (Am. Compl.) at ¶¶ 31-33, 41, 52, 66, 75.[3]

Plaintiffs bring this action pursuant to the Montreal Convention. *Id.* at ¶ 3.[4] Where applicable, the Convention exclusively governs the rights and liabilities of passengers and carriers in international air transportation.[5] On September 26, 2007, the Court issued its Preliminary Order on Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens.

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[3] *See* Brian Ellsworth, *Airline Crash in Venezuela Kills 160* (visited October 31, 2007) <http://www.npr.org/templates/story/story.php?storyId=4802464>.

[4] The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention").

[5] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161, 174-76 (1999) (addressing the Warsaw Convention, predecessor of the Montreal Convention); *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007); *Onwuteaka v. Northwest Airlines, Inc.*, No. H-07-0363, 2007 WL 1406419, *1 (S.D. Tex. May 10, 2007).

D.E. 165. The Court found that Defendant "Newvac is a 'contracting carrier' pursuant to Article 39 of the Montreal Convention and that the doctrine of *forum non conveniens* is applicable in this proceeding pursuant to Article 33(4) of the Montreal Convention." *Id.* at 49. After allowing the parties to fully brief the issue (*id.*), the Court now proceeds to determine whether the actions should be dismissed on *forum non conveniens* grounds.

b. *Forum Non Conveniens*

A party moving to dismiss an action on the basis of *forum non conveniens* "must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. . . ." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (internal citations and quotation marks omitted). With respect to the second prong of the analysis, "balancing private interests requires determining the convenience of the parties, affording domestic plaintiffs a strong presumption that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs." *Id.* Further, although private interest factors are generally considered more important than public interest factors, a court should consider both in its analysis. *Id.*

c. Plaintiffs' Argument

It should be obvious from the facts outlined above that the actions now pending before the Court present a strong case for *forum non conveniens* dismissal. The substance of Plaintiffs' argument in opposition is that the actions should not be dismissed given Defendants' likely assertion of third-party claims for contribution against, *inter alia*, U.S.-based manufacturers. *See*, *e.g.*, D.E. 170 (Pls.' Resp.) at 1-3, 6, 10-12.[6] According to Plaintiffs, the addition of these claims will require significant litigation regarding the apportionment of liability. *Id.* Thus, Plaintiffs suggest superimposing the *forum non conveniens* analysis respecting the potential third-party claims over the *forum non conveniens* analysis applicable to the claims which actually are at issue herein. *Id.* The Court is not persuaded.

Plaintiffs have not cited, and the Court has not found, cases wherein courts have followed the

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[6] Article 37 of the Montreal Convention provides: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." Defendants submit that Plaintiffs' argument is extraneous to the issues before the Court and that therefore, they should not have to concede that they will not pursue third-party claims. *See* D.E. 170 (Pls.' Resp.) at 3 n. 2. Nevertheless, Defendants represent that Defendant West Caribbean bears full financial responsibility to the passengers, as it was the actual carrier. *Id.*; D.E. 180 (West Caribbean's Reply) at 2-3. Thus, West Caribbean represents that it does not intend to assert any third-party claims in Martinique. *Id.*

analytical approach Plaintiffs propose. Plaintiffs cite *Piper Aircraft v. Reyno*, 454 U.S. 235, 259 (1981), where, in discussing the private interest factors, the Supreme Court noted that the district court had "correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland." *Id.*[7] The Supreme Court observed that:

> Joinder of the pilot's estate, [the aircraft's owner], and [the aircraft's operator] is crucial to the presentation of [the manufacturers'] defense. If [the manufacturers] can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if [the manufacturers] were found liable after a trial in the United

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[7] The district court had determined that it would be unfair to make the defendants, U.S. manufacturers of aircraft parts, proceed to trial in the U.S. "because crucial witnesses and evidence [of the aircraft crash] were [in Scotland] beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants." *Id.* at 242 (citing *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 733 (M.D. Pa. 1979)). The district court recognized that even if the trial was held in the United States, the manufacturers could thereafter file indemnity or contribution actions against the Scottish defendants in Scotland. *Id.* at 243 (citing *Reyno*, 479 F. Supp. at 733). However, the district court found that there was a significant risk of inconsistent verdicts based on the differing standards of liability applicable in the U.S. and Scotland, and the danger that different juries would find different facts and produce inconsistent results. *Id.* n. 7.

> States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial.

Id. (internal citation omitted).

The foregoing language supports consideration, as part of the private interest factors, of a defendant's argument that a plaintiff's chosen forum would preclude the defendant from impleading other alleged tortfeasors.[8] In this case, however, it is Defendants who propose Martinique as an alternative forum. They have no doubt considered the advantages and disadvantages of defending themselves therein. Significantly, there is no argument that the U.S.-based entities Plaintiffs refer to cannot be impled [sic] in Martinique.[9] Moreover, Plaintiffs do not persuasively argue that *their* actions will be prejudiced if Defendants elect to file third-party claims in Martinique.[10]

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[8] It is also more convenient to resolve all claims in a single proceeding (*id.*), which avoids the potential for inconsistent results. *Id.* at 243.

[9] Indeed, the "Bapte" Plaintiffs acknowledge filing suit against these entities in Martinique, albeit as an alleged protective measure because Defendant West Caribbean allegedly evaded service of process in this action. *See* D.E. 170 (Pls.' Resp.) at 20.

[10] Plaintiffs cursorily submit that if the actions are tried in Martinique they will litigate claims against the U.S. manufacturers under U.S. law, while if the actions remain here, they will not. *See* D.E. 170 (Pls.' Resp.) at 5. This argument, purportedly based on the Hague Convention on the Law Applicable to Products Liability, is devoid of any details that would allow the

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Therefore, the Court will consider the potential third-party claims in the context of the private and public interest factors, as such consideration does not alter the Court's ultimate determination. The Court notes, however, that in the instant cases Plaintiffs' arguments concerning the Defendants' ability to implead third parties do not carry the same weight as when a defendant claims prejudice from its inability to implead potential tortfeasors. *See, e.g., Kilvert v. Tambrands Inc.*, 906 F. Supp. 790, 795-96 (S.D.N.Y. 1995); *Morse v. Sun Intern. Hotels, Ltd.*, No. 98-7451-Civ, 2001 WL 34874967, *4 (S.D. Fla. Feb. 26, 2001).

d. Alternative Forum

The moving party must demonstrate the availability *and* adequacy of an alternative forum. *See Leon*, 251 F.3d at 1311. Generally, an alternative forum is available if the moving party shows that it is amenable to process in that forum or if it consents to the jurisdiction of the alternative forum. *Id.*; *Reyno*, 454 U.S. at 242, 254 n.22; *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282-83 (11th Cir. 2001); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996). In this case Defendants stipulate that if the Motion is granted, they will submit to the

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Court to weigh its validity and significance, if any. *Id.* The Court finds Plaintiffs' contention wholly unpersuasive where they have not sued the manufacturers in this forum and offer no explanation why dismissing the actions to Martinique would suddenly compel them to pursue those actions therein.

jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25; D.E. (168) (Resp. to Court Order). Thus, the Court finds that Martinique is an available forum.

With respect to "adequacy," the alternative forum need not perfect. *See Leon*, 251 F.3d at 1311. "Courts have been strict about requiring that defendants demonstrate that the alternative forum offers at least some relief." *Id.* Defendants have submitted the declaration of French attorney Maylis Casati-Ollier, who has practiced in the area of aviation law for more than 30 years. *See* D.E. 162 (Casati-Ollier Decl.) at ¶¶ 1, 5. Ms. Casati-Ollier advises that in the French judicial system, a "*Tribunal de Grande Instance*" ("TGI") has exclusive jurisdiction over actions arising under the Montreal Convention. *See* D.E. 162 (Casati-Ollier Decl.) at ¶¶ 6-8. There is a TGI in Fort-de-France, Martinique, and pursuant to Article 33 of the Montreal Convention, it may entertain Plaintiffs' actions and award damages. *Id.* at ¶¶ 8, 17, 19-21. Thus, the Court has no reason to doubt that Martinique is an adequate forum. In fact, Plaintiffs do not dispute this element of the *forum non conveniens* analysis.

Nevertheless, the Court addresses Plaintiffs' suggestion, in their discussion of the public interest factors, that the actions would proceed inefficiently in Martinique because there is only one four-chamber

court therein. *See* D.E. 170 (Pls.' Resp.) at 22.[11] These intimations are insufficient to raise an issue as to the adequacy of a forum. Where inefficiency is alleged "defendants have the ultimate burden of persuasion, but *only* where the plaintiff has *substantiated his allegations of serious . . . delay.*" *Id.* at 1312 (emphasis added).[12] Plaintiffs' allegations fail to substantiate an argument of inadequacy based on the inefficiency of Martinique's judicial system. *Id.*; *cf.* D.E. 171 (Bellecave Decl.) at ¶¶ 16-18. Therefore, based on the uncontested declaration of Ms. Casati-Ollier, the Court finds that Martinique is an adequate forum to adjudicate these actions.

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[11] The TGI in Martinique is "composed of four 'sections', each of the first three integrated by three magistrates and the fourth composed by a single Judge." *See* D.E. 171 (Bellecave Decl.) at ¶ 16.

[12] "Thus, where the allegations are insubstantially supported . . . a District Court may reject them without considering any evidence from the defendant. But where the plaintiff produces significant evidence documenting . . . delay (in years) typically associated with the adjudication of similar claims, and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise." *Id.*

e. Private Interest Factors[13]

First, although "there is normally a strong presumption that the plaintiff has chosen a sufficiently convenient forum," this presumption weakens "when the plaintiff is a foreigner litigating far from home." *Id.* at 1314-15. As previously noted, Plaintiffs are, and the decedents were, residents of Martinique; none of them are (were) U.S. citizens. Therefore, the presumption that Plaintiffs have chosen a sufficiently convenient forum in filing suit in the Southern District of Florida is entitled to less deference in this case. *See Leon*, 251 F.3d at 1315.[14]

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[13] "'Private interests' include . . . 'ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Leon*, 251 F.3d at 1314 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

[14] The court is not persuaded by Plaintiffs' argument that they should be accorded "deference that is *equal* to that accorded to U.S. residents" because: (1) they have sued in one of the negotiated fora provided for in the Montreal Convention, or (2) as a matter of comity towards France. *See* D.E. 170 (Pls.' Resp.) at 12-13. The greater deference accorded to a U.S. resident follows from the reasonable assumption that a plaintiff choosing her home forum does so because it is convenient. *See Reyno*, 454 U.S. at 255-56. This assumption is not otherwise warranted. *Id.*; *cf. Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72-73 (2d Cir. 2003) (declining to afford the Liberian plaintiffs' forum choice the same deference afforded to a U.S. citizen's forum choice where the pertinent treaty did not grant Liberian nationals access to U.S. courts on terms no less favorable than those applicable to U.S. nationals).

With respect to ease of access to sources of proof, the Court finds that this factor favors Martinique over the United States. The parties agree that with respect to the Montreal Convention claims, Defendants' liability will not be at issue. *See* D.E. 163 (Counsel for Cimetier Defs.' Decl.) at ¶ 5; D.E. 170 (Pls.' Resp.) at 2; D.E. 179 (Cimetier Defs.' Reply) at 1; D.E. 180 (West Caribbean's Reply) at 2-3.[15] Thus, the principal contention between the parties herein will be the amount of damages to which each Plaintiff is entitled. In this regard, Plaintiffs concede that "most if not all of the damages evidence is found in Martinique." D.E. 170 (Pls.' Resp.) at 15. Accordingly, evidence pertinent to the issue of damages – including the decedents' medical, employment and financial records, as well as testimony from the decedents' relatives, employers and physicians – will be more conveniently examined (both during discovery and at trial) in Martinique. To the extent that any of these records and witnesses are not willingly produced, this Court would not be able to *compel* their production and attendance. *See, e.g., Magnin*, 91 F.3d at 1430.[16]

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[15] If the Motion is granted, Defendants are conceding that the damages sought are governed by Article 21(1) of the Montreal Convention, and will not resort to the defense available under Article 21(2). *See* D.E. 159 (Motion) at 15; D.E. (168) (Resp. to Court Order).

[16] "Other factors that indicate France is the better forum for litigation of this case include the unavailability of compulsory process to secure attendance of French witnesses in a court in this country. . . ." *Id.* Plaintiffs suggest that this Court has treaty power to direct subpoenas to France, which would be

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Even for those documents and witnesses that are available on a voluntary basis, the cost of producing them in this country, presumably in translated form, weighs in favor of litigation in Martinique. *Id.*[17]

Plaintiffs also refer to Defendants' potential claims for contribution against U.S. manufacturers. *See supra* part c. As to these potential third-party defendants, it is undisputed that evidence pertaining to claims sounding in products liability will be located in the United States, not in Martinique.[18] Plaintiffs do

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served pursuant to the Hague Convention on Service Abroad, 20 U.S.T. 361. *See* D.E. 170 (Pls.' Resp.) at 18 (citing 28 U.S.C. §§ 1369, 1785, and referring to the Hague Evidence Convention (28 U.S.C. § 1781 note)); D.E. 171 (Bellecave Decl.) at ¶ 19. The Hague Conventions operate on the basis of letters of request, which are impractical in the instant actions given the number of potential records and witnesses, and that letters of request are notoriously time-consuming. *See Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp.*, 421 F. Supp. 2d 741, 768-69 (S.D.N.Y. 2006).

[17] The Court notes that Plaintiffs have offered to bear the cost of "bringling] to trial" fact witnesses as to damages. *See* D.E. 170 (Pls.' Resp.) at 20. While this alleviates some of Defendants' potential costs, the offer does not extend to the expensive proposition of conducting discovery respecting non-party witnesses in Martinique, which can be expected to include travel, lodging, and translation costs.

[18] According to Plaintiffs, there is evidence that the aircraft's systems that monitored and controlled engine power were deficient. In this regard, Plaintiffs identify the Boeing Company, successor to the aircraft's manufacturer, McDonnell Douglas, as a potential third-party Defendant. *See* D.E. 170 (Pls.' Resp.) at 6 (also noting the absence of a "stick pusher" device that would aid in the recovery from an aerodynamic stall). Plaintiffs also cite

(Continued on following page)

not contend, however, that the U.S. manufacturers cannot be impled [sic] in an action in Martinique. Plaintiffs have not shown that if the U.S. manufacturers are made parties to the action as Plaintiffs contemplate, evidence in the possession and/or control of the U.S. manufacturers will not be available in a proceeding in Martinique. *Cf.*, *e.g.*, D.E. 162 (Casati-Ollier Decl.) at ¶¶ 10-15 (outlining the procedures available under the French judicial system to, *inter alia*, ensure the parties' production of evidence). In this regard, the private interest considerations in the instant cases are indistinguishable from those in numerous cases in which *forum non conveniens* dismissals have been granted in products liability actions against U.S. aircraft and part manufacturers. *See*, *e.g.*, *Reyno*, 454 U.S. 235; *Magnin*, 91 F.3d 1424; *Satz*, 244 F.3d 1279. Thus, while ease of access to the manufacturers' evidence would be greater in this forum (*see Reyno*, 454 U.S. at 257), the Court finds that this factor is of lesser concern when compared to the inconvenience of accessing evidence pertaining to damages, in Martinique, respecting more than a hundred decedents and their beneficiaries.

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deficiencies in the engines and identify the engines' manufacturer, Pratt and Whitney, in this regard. *Id.* Finally, Plaintiffs identify Honeywell-Bendix, manufacturer of the aircraft's weather radar, as another potential third-party defendant. *Id.* Plaintiffs submit that the records pertinent to these components are located in the United States. *Id.* at 16.

Moreover, it is important to note that the private interest considerations are intended to address the convenience of the parties. *See Leon*, 251 F.3d at 1311. As previously noted, it is Defendants who seek dismissal of this action in favor of Martinique. Thus, if Defendants decide to assert third-party claims against the U.S. manufacturers in Martinique, Defendants will be the parties prejudiced by any inconvenience related to accessing third-party liability evidence in the United States or elsewhere. Again, Plaintiffs have not established that *they* will be inconvenienced by the potential litigation against the U.S. manufacturers in Martinique. *See supra* n. 10. Plaintiffs have not filed actions in this forum against the U.S. manufacturers and the Court is not convinced by Plaintiffs' bare assertion that if the actions are taken to Martinique they will do so therein. *Id.*

Plaintiffs also refer to non-party liability evidence located in Colombia, Venezuela[19] and Panama. *See* D.E. 170 (Pls.' Resp.) at 16-17, 18. However, Plaintiffs concede that "the court in Martinique will be no better at compelling the production of evidence from those countries than this Court will." *Id.* at 17. Therefore, this factor does not favor either forum.

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[19] As previously noted, West Caribbean's aircraft crashed in Venezuela. However, the location of the accident, by itself, is not one of the "jurisdictions" where an action for damages under the Montreal Convention may be brought. *See* Montreal Convention, art. 33.

Plaintiffs further contend that "[t]he burden of translating relatively simply [sic] damages evidence into English is far outweighed by the burden that would be imposed if all the liability evidence, in English and Spanish, had to be translated into French." *Id.*[20] However, Plaintiffs do not contend that this burden will be theirs to bear. Under Plaintiffs' contemplated scenario – *i.e.* Defendants suing U.S. manufacturers for contribution in Martinique – Plaintiffs' argument is not persuasive; Defendants and the U.S. manufacturers would incur these costs.

Plaintiffs also make brief general references to: (1) FAA and NTSB records in Washington pertaining to the certification and safety of U.S.-made aircraft and component parts; and (2) government accident investigators in the United States. *See* D.E. 170 (Pls.' Resp.) at 16, 18.[21] However, Plaintiffs have not explained the extent to which such evidence is public information or would require the issuance of compulsory process. Plaintiffs, thus, have not shown that this type of evidence will be less accessible in Martinique.

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[20] According to Plaintiffs "liability evidence consists of highly technical documents and testimony that often are hard to understand, even by native speakers." *Id.*

[21] There is no indication that the accident at issue is being investigated by the NTSB. "The investigation is being conducted by the Venezuela Comite de Investigacion de Accidentes Aereos." *See* <http://www.ntsb.gov/ntsb/GenPDF.asp?id=DCA05RA093&rpt=fa> (NTSB Factual Report) (visited October 31, 2007).

In sum, even after according Plaintiffs the deference they are due, and considering the potential third-party claims, the private interests in these actions weigh in favor of Martinique.

f. Public Interest Factors[22]

The public interest factors also weigh in favor of Martinique. The decedents were residents of Martinique and the relief sought in each of the consolidated actions is a damages award that will benefit residents of Martinique. The Court finds that when compared to this forum, Martinique has a superior interest in the adjudication of actions that seek to redress injuries to a significant number of its residents. The interest of this forum relates to the conduct of Newvac, and potentially, the U.S. manufacturers. *See, e.g.*, D.E. 170 (Pls.' Resp.) at 5-6, 24-25 (describing Newvac's conduct), 6 (describing the manufacturers' conduct). While the Court appreciates that this forum has an interest in deterring the alleged tortious conduct of these and similar entities, this interest cannot be equated to that of Martinique, whose residents have been the ones affected by the immediate and tangible impact of the deaths at issue. *See, e.g.*,

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[22] "Public-interest factors 'include the sovereigns' interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law.'" *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 937 (11th Cir. 2005) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997)).

Gilbert, 330 U.S. at 509 ("In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."). Further, the deterring impact that a damages award may have cannot be said to be greater if the actions are pursued in this forum. *See, e.g.*, *Reyno*, 454 U.S. at 260-61.

Moreover, from an administrative standpoint, "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 261. It is the Court's experience that live testimony given in a foreign language demands significantly more time from the Court given that the questions and answers need to be translated, and often times repeated. These actions likely will involve the presentation of live testimony and documentary evidence on damages relating to more than a hundred decedents and their beneficiaries. The Court acknowledges that if third-party U.S. manufacturers are impled [sic], live testimony on the liability portion of the proceedings would be more conveniently handled by this Court. However, the parties are in agreement that the TGI in Martinique will not hear live testimony; "parties, witnesses and experts appear only through written briefs." D.E. 171 (Bellecave Decl.) at ¶ 15; *accord* D.E. 162 (Casati-Ollier Decl.) at ¶ 10. Thus, although both fora face the potential

submission of translated testimony and documents, only the participants in trials in this Court would have to assume the burden of live contemporaneous translations. A trial in this forum would burden members of this community with jury duty under these circumstances, where, as already noted, the most significant interests are those of Martinique. *Cf. id.* at ¶ 8 (jury trial is unavailable in Martinique).

Finally, Defendants submit that if the actions remain here the Court would need to apply French law. *See* D.E. 159 (Motion) at 23-25. Plaintiffs posit, however, that assuming Defendants are correct, the Court would only need to apply French law as to damages and that French law is not much different than Florida law. *See* D.E. 170 (Pls.' Resp.) at 25-26. Plaintiffs submit that in contrast, if the third-parties are sued in Martinique, those claims would be governed by the laws of each of the U.S. manufacturers' domicile states. *Id.* at 26 (citing to the Hague Convention on the Law Applicable to Products Liability). If Plaintiffs are correct,[23] this factor would weigh in favor of this forum. However, this factor is not

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[23] The Court finds the parties' filings on the choice of law issue insufficient to make a reasoned determination on whether and to what extent either forum would need to apply foreign law. However, this factor does not alter the Court's determination, even after assuming that Plaintiffs are correct.

dispositive[24] and, on balance, the public interest factors favor Martinique.

g. Reinstatement of Suit

The Court must consider whether "the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. As previously noted, Defendants stipulate that if the Motion is granted, they will submit to the jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25. Further, Defendants are waiving any statute of limitations defenses. *Id.*; D.E. (168) (Resp. to Court Order).[25] It is undisputed that some Plaintiffs have already commenced proceedings against West Caribbean and its insurer, as well as American manufacturers, in Martinique. Moreover, Plaintiffs do not argue that they will be unable to reinstate their actions in Martinique, or that they will be unduly inconvenienced or prejudiced in doing so. Therefore, the Court is satisfied that Plaintiffs will be able to reinstate their suit in Martinique, and that they will

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[24] *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1104-05 (11th Cir. 2004).

[25] According to Ms. Casati-Ollier, "there is nothing [under French law] that prohibits the defendant from waiving the benefit of the limitation period of Article 35 of the Montreal Convention in a specific case." D.E. 162 (Casati-Ollier Decl.) at ¶ 23.

be able to do so "without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED. The actions specified *infra* are dismissed on the basis of *forum non conveniens*, without prejudice to their refiling in Martinique, France. It is further

ORDERED AND ADJUDGED that Defendant Aseguradora Colseguros is dismissed without prejudice. *See supra* n. 2.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of November 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 06-22748-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, S.A., a Colombian corporation, et al.
_____/

ORDER TO CLARIFY ORDER OF DISMISSAL

THIS CAUSE is before the Court upon Plaintiffs' Motion To Clarify this Court's Order Granting Defendants' Motion to Dismiss for *Forum non Conveniens* to clarify the imposition of conditions on the parties that are contemplated prerequisites to this Court's dismissal of the above action on the grounds of *forum non conveniens*. (D.E. 184)

THE COURT has considered the motion, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED, subject to the following conditions. The Defendants must 1) submit to the jurisdiction of, and accept service of process from, the courts of Martinique; 2) waive any statute of limitations arguments respecting the refiling of the actions in Martinique, (D.E. 184); and 3) agree that damages sought are governed by Article 21(1) of the Montreal Convention, and that they will not resort to the defenses provided for in Article 21(2);

The parties have stipulated that the concessions of the Defendants are binding and shall be considered a condition of the Order of Dismissal provided that the Plaintiffs' in these consolidated actions, or the beneficiaries on whose behalf they are brought, re-commence their actions in Martinque, France within six (6) months of the date of this order. Moreover within fourteen (14) days of this Order, Plaintiffs shall file and serve upon opposing counsel a complete list of all the beneficiaries whom they represent in these consolidated matters, unless such names have previously been specifically and fully incorporated in the Amended Complaint(s) filed herein.

DONE AND ORDERED in Miami, Florida, this 7 day of December, 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES
DISTRICT JUDGE

Copies provided
cc:Counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-15830-AA

SYLVIA BAPTE,
Individually and as personal representative
of the Estates of CHRISTIANE BAPTE,
deceased, and SYLVAIN BAPTE, deceased,
STEPHANIE ISABELLE BAPTE,
AUBIN CASIMIR,
MARYVONNE BAPTE,
NATHALIE SEVERINE BARAY,
Individually and as personal representative
of the Estates of LUCIEN BARAY, deceased,
and MINETTE BARAY, deceased,
BEATRICE BARAY,
LUDOVIC BARAY,
SEVERINE BARAY,
LUCIEN AUDRE BARAY,
DANIEL BARAY,
CLEMENT YVES MICHEL,
MARIE DOMINIQUE BOURELLY,
YVES NICOLAS BARAY,
CHRISTIAN MICHEL,
CHANTAL JEANNE MICHEL,
SERGE FRANCOIS MICHEL,
ERIC ANSELME MICHEL,
MURIELLE DELPHINE MICHEL,
MAURICE JEAN MICHEL,
GISELE BERISSON,
Individually and as personal representative
of the Estate of Paul Berrison, deceased,

and GEORGE BERISSON, deceased,
DOMINIQUE BERISSON,
EVELYNE BERISSON,
MAUDE BERISSON,
NADEGE BERISSON,
SABRINA BERMONT,
CHRISTOPHE ETIENNE BERMONT,
JOHANNE NICOLAS BERMONT,
MATHIAS BERMONT,
SALOME BERMONT,
SIDONIE PABIOU,
MARIE-CLAUDE ALICE BOUTON,
Individually and as personal representative of the Estate of MARIE ANDREE BOUTON, deceased,
FABRICE EMMANUEL BOUTON,
MICHEL BACHAUMONT,
SABINE ZOE SEBASTIEN,
Individually and as personal representative of the Estate of GEORGETTE SEBASTIEN, deceased,
SYLVETTE MARIE-SAINTE,
ANXCIA SEBASTIEN,
ANDY SEBASTIEN,
DOVANY SEBASTIEN,
JOSE SEBASTIEN,
ALBERT DENIS EMMANUEL JEAN-FRANCOIS,
Individually and as personal representative of the Estate of VELIANE JEAN-FRADOIS, deceased,
MICHELE VERONIQUE JEAN-FRANCOIS,
GERARD EDOUARD JEAN-FRANCOIS,
JUDITH MARIE-ANTOINETT JEAN-FRANCOIS,
GAETAN JEAN-FRANCOIS,
ISABELLE VERIN,
KATIA VERIN,
DANIEL VERIN,
Individually and as personal representative

of the Estate of GISLAINE VERIN, deceased,
ANGELE RIGAH,
WILFRID BRUNET,
LEOPOLD LUC BRUNET,
ETIENNET CYRILLE BURNET,
EMILIE MARIE-CLAUDE BURNET,
JACQUELINE MARCELLE BURNET,
JONAS RIGAH,
KIMBERLEY JACQUES,
SLY JACQUES,
PIERRE CATORC,
Individually and as personal representative of
the Estate of Mailys Catorc,
MAGALY CATORC,
FRANCOIS JEABERT,
Individually and as personal representative of
the Estate of ANTOINETTE JEABERT, deceased,
DOROTHEE LARGANGE,
TOMMY CATORC,
MARIE-HELENE BOLO,
EUGENIA SAINT-AUDE,
FRANCOIS LARGANGE,
MARIE BERTJE GRABIN,
RAYMOND LARGANGE,
ROSE-MARIE LECLERE,
MICHELLE CARBETY,
ANDREE MARIE-ROSE,
FRANCOIS JEABERT,
CARINE CHASSOL,
Individually and as personal representative of the
Estates of EUGENE CHASSOL, deceased,
and GEORGETTE CHASSOL, deceased,
CHRISTOPHE CHASSOL,
RENELISE JULIENNE THEODORE,
EMILIE JEAN-JULIEN,

CORNEILLE THEODORE,
CLAUDINE THEODORE,
CHRISTINE LUCIE THEODORE,
ALAIN THEODORE,
MATHIEU TIBURCE THEODORE,
MAX ALGER,
JOSE LAURENT ALGER,
JOSIE JEROME ALGER,
EDMOND AGATHE ALGER,
GINETTE FERNANDE ALGER,
JULIEN BERTIN CHASSOL,
HORTENSE MARIE-EUGENIE MONGAILLARD,
MARIE-LOUISE ANCINON,
BRICE CECILIA CHASSOL,
DARIUS ANRETAR,
BERNARD CHARLES NICOLAS,
EDGAR GUY CHARLES NICOLAS,
MATHIEU MAURICE CHARLES NICOLAS,
MARCEL SERGE MONGAILLARD,
MARLENE NICOLAS,
MARYSE HONORAT CLERY,
ERICK CLERY,
CARINE CHASSOL,
Individually and as personal representative of the Estate of GEORGETTE CHASSOL, deceased
CECILE DANY DELAHAYE,
Individually and as personal representative of the Estate of GUY DELAHAYE, deceased,
NOELLE RENEE DELAHAYE,
JEAN-MARC DELAHAYE,
CHRISTIAN DELAHAYE,
GABRIEL DELAHAYE,
PATRICK ETIFIER,
Individually and as personal representative of the Estate of EMILIE JUSTINE ETIFIER, deceased,

ANDRE JEAN-JOSE FELICITE,
Individually and as personal representative of the
Estates of BERTRAND RAOUL FELICITE, deceased,
and MARIE CARMEN FELICITE, deceased,
NICAISE MARIE ROMUALD MINAR,
DANIEL MICHEL FELICITE,
PATRICK MAXIME FELICITE,
LYSIANE CHRISTINE FELICITE,
ANDRE YVES SENERON,
BEATRICE FIONA MINAR,
STEPHANE JEAN CHRISTOPHE MINAR,
FABIEN LOUIS VIALLARD,
LUDOVIC FABIEN FELICITE,
SYLVAIN TEDDY FELICITE,
CELIA CHRISTELLE FELICITE,
VIRGINIE MONCHAUSSAT,
ANNE-SOPHIE MONCHAUSSAT,
JEAN MINAR,
VIVIANE CHRISTINE FELICITE,
JOELLE MARIE ROMAINE SALVIN,
GERARD SALVIN,
YOLAINE SALVIN,
LUC LAURENT SALVIN,
ANDRE JEAN-JOSE FELICITE
Individually and as personal representative of the
Estate of MARIE CARMEN FELICITE, deceased
HERVE NICOLAS GERMANY,
Individually and as personal representative of the
Estates of ANDRE ABEL GERMANY, deceased,
and ROSEMONDE GERMANY, deceased,
ALBERT BERNARD GERMANY,
JEAN LIN GERMANY,
PAULETTE FLORENT,
EDITH FLORENT,
MARIE-JEANNE GERMANY,

FREDERIC ROGER GERMANY,
MARC ANDRE GERMANY,
CHRISTOPHE GERMANY,
BRUNO FLORENT,
VIVIANE BORICAUD,
ERIC FLORENT,
HUGUES FLORENT,
JACQUES LEON FLORENT,
MARIE VIRGILE FLORENT,
GARRY REMI GERMANY,
HENRI GERMANY,
JEAN-CLAUDE GERMANY,
JEAN-CHARLES GERMANY,
DANIEL HIERSO,
Individually and as personal representative of the Estates of VERNIER HIERSO, deceased, and VICTORINE HIERSO, deceased,
NICOLE HIERSO,
WILSON HIERSO,
FELIX HIERSO,
CHRISTELLE HIERSO,
NOAH HIERSO,
MAELYS HIERSO,
NATHALIE FLORENT CRETINOIR,
Individually and as personal representative of the Estate of ARSENE KIMPER, deceased,
FERNAND OLIVER BACCARARD,
VALERIE AGNES ICARE,
HONORINE FRANCILLIA KIMPER,
URSULE ROLAND KIMPER,
GREGOIRE ROSETTE MORMIN,
NICOLAS ANGELE KIMPER,
AUSTREM COLETTE VANDOL,
OPHELIE CRETINOIR,
JOSUE CRETINOIR,

PASCALE VANDOL,
KRISTINE VANDOL,
KARINA MORELLON,
Individually and as personal representative of the Estate of JEAN GERMANY LAURENT, deceased,
OLIVIER JEAN MORELLON,
NATHALIE MAUCONDUIT,
Individually and as personal representative of the Estate of LISETTE MAUCONDUIT, deceased, and ANGELO MAUCONDUIT, deceased,
MANUELLA MAUCONDUIT,
SEBASTIEN LICARE,
CREPIN JEROME,
EMILIENNE MADRE,
RENE COLAS,
MARIE JOSEE JEAN-MARIE,
GUY ANDRE COLAS,
EDOUARLINE FEVAL,
FRANZ AGONDANOU,
KERLHAN AGONDANOU,
CELEYNE AGONDANOU,
TAHYNA AGONDANOU,
NICOLAS MAINGE,
Individually and as personal representative of the Estates of HUBERT MAINGE, deceased, and VIVIANE MAINGE, deceased,
JULIE MAINGE,
ANNICK BURNER,
ALAIN BURNER,
LEILA BURNER,
SYLVESTRE ROSE-MARIE PELICAN,
Individually and as personal representative of the Estates of ELODIE MAQUIABA, deceased, and MARIE-ANNICK TAUPIN, deceased,
LUCIANE TAUPIN,

NICAISE YOLENE GONIS,
PIERRE PAUL TAUPIN,
ALAIN ANGE TAUPIN,
SEVERIN CHARLES TAUPIN,
HONORINE YVONNE TASBILLE,
MARIE-AGNES LASIMANT,
CHANTAL FAYE,
Individually and as personal representative of the
Estate of MARCEL MARIE-LUCE, deceased,
MAGALIE JOSEPH-ANGELIQUE,
EDDY MARIE-LUCE,
MARIE-LOUISE MARIE-LUCE,
DENISE PAULE VAL,
CHARLES RANO,
JEAN-CLAUDE PADERNA,
LUCIEN PADERNA,
BERNABE MASSAL,
JEANNE MASSAL,
Individually and as personal representative of the
Estates of MAX MASSAL, deceased,
NICHOLAS MASSAL, deceased,
and MAEVA MASSAL, deceased,
RAYMOND MASSAL,
JEAN-PIERRE MASSAL,
MANUELLA DENISE LORNE,
Individually and as personal representative of the
Estate of SERGE NAL, deceased,
MARIE-SUZETTE MARTINE,
ALPHONSE GEORGES NAL,
GISELE ROMAINE NAL,
FELIX FRANTZ NAL,
RAPHAEL NICAISE NAL,
ANTOINETTE ANNICK CHRISTIANE LE COADIC,
LEA MARTINE LORNE,
MARIE-NELLY MARTINE,

MIKAEL PIERRE MARTINE,
ASSOCIATION TUTELAIRE APASI,
as Guardian of DANIEL NOELO, an incompetent,
Individually and as personal representative of the
Estate of ANDRE NOELO, deceased,
HUGUES PEPINTER,
Individually and as personal representative of the
Estates of HENRI PEPINTER, deceased,
and PARFAITE ROSE PEPINTER, deceased,
CATHERINE PEPINTER,
EDOUARD PEPINTER,
DOMINIQUE PEPINTER,
JOCELYN DONATIEN PEPINTER,
CYNTHIA PEPINTER,
WENDY ROSE ELITA PEPINTER,
ORLANE ROSE-AIMEE PEPINTER,
LUDIVINE PEPINTER,
AMBRE PEPINTER,
LENNY PEPINTER,
ENDRICK PEPINTER,
MURIELLE VIVIANNE NATHALIE PEPINTER,
WEDLENE PEPINTER,
CHRISTINE BRIAND,
Individually and as personal representative of the
Estates of URBAIN RAPHOSE, deceased,
and THERES RAPHOSE, deceased,
FABRICE JEAN-PHILIPPE RAPHOSE,
PASCAL BRIAND,
RAPHAEL BRIAND,
MELINA BRIAND,
RITA CHAILLON,
Individually and as personal representative of the
Estate of BERTHE ROCH, deceased,
RODRIGUE ROCH,
ROSE-LINE DANTIN,

CHRISTIAN-LUC TONOMAL,
FIONA ROCH,
SORAYA DANTIN,
AUDRAN DANTIN,
ISABELLE ROCH,
ALAIN DANTIN,
CORINNE MAURICE,
Individually and as personal representative of the Estate of GINETTE SERALINE, deceased,
ALEXANDRA MAURICE,
AUDREY MAURICE,
JOSE MAURICE,
THIERRY SURIN,
Individually and as personal representative of the Estate of GISLAINE SURIN, deceased,
MARLENE LUDOVIC CIZO,
Individually and as personal representative of the Estate of ANDRE PILIBERT VALQUIN, deceased,
CHARLES-ANDRE VALQUIN,
MARIE-HELENE VALQUIN,
DIMITRI MARCEL VALQUIN,
ANDRE LUDOVIC VALQUIN,
PASCALE VICTORIN,
Individually and as personal representative of the Estate of ANICET VICTORIN, deceased,
ANNIE VICTORIN,
MURIELLE VICTORIN,
MICHEL BACHAUMONT,
NOLHANN MONGAILLARD,
MIGUEL VICTORIN,
JEAN-LUC VICTORIN,
DANIEL PREPONT,
CHRISTIAN RANDON,
JEAN-YVES LIMERI,

Individually and as personal representative of the Estate of KARINE LIMERI, deceased, ALL PLAINTIFFS,

Plaintiffs-Appellants,

versus

NEWVAC CORPORATION, a Florida corp., GO 2 GALAXY, INC., a Florida corp., WEST CARIBBEAN AIRWAYS, S.A., a Columbian Corp.

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Dec. 30, 2009)

BEFORE: BARKETT and HULL, Circuit Judges, and QUIST,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

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No. 09-1199

Supreme Court, U.S.
FILED
MAY 5 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SYLVIA BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, NEWVAC CORPORATION, GO 2 GALAXY, INC., JACQUES CIMETIER, and ASEGURADORA COLSEGUROS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Plaintiffs in the Courts Below

Plaintiffs filed three separate actions on behalf of the 152 passengers-decedents.

a. Sylvia Bapte v. Newvac Corporation (The Bapte Plaintiffs): A list of the plaintiffs in *Bapte* is set forth in the Appendix to the Petition for Writ of Certiorari at App. 111-120.

b. Henri Galbert v. West Caribbean Airways (The Galbert Plaintiffs): The following is a list of the plaintiffs and claimants in *Galbert* as set forth by plaintiffs in the Courts below:

1. Arcade, Laura Mylene
2. Bapte, Jean-Marc
3. Bapte, Jean-Michel
4. Berisson, Nadine
5. Berisson, Patricia
6. Bermont, Christophe
7. Bermont, Johanne
8. Bermont, Sabrina
9. Bermont, Yvette
10. Borot-Lapoulia, Marie-Claude
11. Cabrera, Odile
12. Cadignan-Victorin, Gabrielle
13. Cage, Vincent Jose
14. Clerence, Manuel
15. Couffe, Adrienne
16. Couffe, Didier-David
17. Couffe, Jenny Jacqueline
18. Couffe, Josette Madeleine
19. Couffe, Raymonde
20. Couffe, Rolland Roger
21. Destinval, Joel

22. Dijon, Gerard
23. Dijon, Jean-Robert
24. Dijon, Loic
25. Dijon, Mary-Line
26. Dijon, Maurice
27. Dijon, Nicolette
28. Dijon, Paule
29. Egesipe, Karine
30. Emal, Marie-Louise
31. Eudaric, Astrid
32. Eudaric, Hervey
33. Eudaric, Jean-Claude
34. Fostan, Felix
35. Galbert, Daniel
36. Galbert, Henri
37. Gombe, Alix
38. Gombe, Desiree Marie-Gregorie
39. Gombe, Manuela Edmee
40. Grabin, Franck
41. Grabin, Kevin
42. Hayot, Christophe
43. Hospice, Daniel
44. Hospice, Eric
45. Hospice, Sarah
46. Iphaine, Doris
47. Iphaine, Jean-Marc
48. Iphaine, Maguy Marlene
49. Iphaine, Marie-Claire
50. Iphaine, Serge
51. Iphaine, Simone
52. Jeremie, Joelle
53. Jeremie, Tony
54. Joachim-Arnaud, Simone
55. Joseph-Auguste, Irlene
56. Joseph-Boniface, Celine
57. Jougan, Phillipe Gislaine

58. Jougon, Saint-Cyr Athanase
59. Landes, Alex Elisabeth
60. Landes, Andre Vincent
61. Landes, Jean Claude Joseph
62. Landes, Marcel Saturnin
63. Landes, Rose Eliane Florian
64. Landes, Serge Reine
65. Landes-Berton, Ines
66. Lanior, Jenny
67. Lanoir, Gilbert
68. Lanoir, Lenny
69. Lanoir, Marvin
70. Lanoir, Rene
71. Laurent-Cyrille, Marie-Eugenie Bernadette
72. Legendart, Johan
73. Legendart, Lucette
74. Louisor, Jeanne Porro
75. Magloire, Djera
76. Magloire, Sylvie
77. Magloire, Tadjana
78. Magloire, Yendra
79. Maquiaba, Victor
80. Marie-Claire, Emma
81. Marie-Claire, Henri Bleral
82. Marie-Claire, Monette
83. Marie-Luce, Ketty Emmanuelle
84. Marie-Luce, Marie-Jeanne
85. Martial, Malika Mylene Vincent
86. Mitrail, Michelle Theodore
87. Montlouis-Felicite, Daniel
88. Montlouis-Felicite, David
89. Montlouis-Felicite, Guy
90. Montlouis-Felicite, Huguette
91. Montrop, Amandine
92. Nal, Henri
93. Nal, Luce

94. Nal, Marcel Jean-Pierre
95. Nal, Mariette
96. Nicolas, Charpentier Marcel
97. Novy, Suzette
98. Olivarius, Harry
99. Peters, Florent Joseph Gerard
100. Peters, Jany Josephe Therese
101. Peters, Monique Josephe Gerard
102. Peters, Suzelle Joseph Eliette
103. Peters, Yvelise
104. Procolam, Joel
105. Procolam, Madeleine
106. Pronzola, Laure
107. Ramin, Jean-Marc
108. Ramin, Murielle
109. Ramin, Olivier
110. Ramin, Regine
111. Raphose, David
112. Rosamond, Dorianne
113. Rosamond, Florent Joseph
114. Rosamond, Franck
115. Rosamond. Jean Lambert
116. Rosamond, Rita Rosamond, Robert
117. Rosamond, Rodolphe
118. Rosamond, Ulric
119. Sainte-Rose, Georges-Henri Jean
120. Sainte-Rose, Nathalie Raoul
121. Sainte-Rose, Roger Hubert
122. Seneron, Marie-Therese
123. Sinosa, Manuela Louise Louis-Marie
124. Strykala, Jocelyne
125. Tisserand, Andre Joseph
126. Venkatapen, Danielle
127. Venkatapen, Eliane
128. Venkatapen, Georges
129. Venkatapen, Jeanne

130. Venkatapen, Raymonde
131. Venkatapen, Rene
132. Venkatapen, Rose-Marie
133. Viardot, Rudy
134. Viardot, Valerie
135. Violton, Fred
136. Violton, Omemicia
137. Violton, Roberto
138. Violton, Valerie

c. Marie-Pierre Cadare v. Newvac Corporation (The Cadare Plaintiffs): The following is a list of the plaintiffs in *Cadare* as set forth by plaintiffs in the Courts below:

1. Cadare, Marie-Pierre, through her Personal Representative
2. Couffe, Raphaelle, through his Personal Representative
3. Berton, Francis, through his Personal Representative
4. Felicite, Marie-Odile Monlouis, through her Personal Representative
5. Scaglioni, David, through his Personal Representative

Defendants in the Courts Below

Defendants in the District Court and Court of Appeals below were as follows:

1. West Caribbean Airways, S.A., a Colombian air carrier which operated the chartered aircraft involved in this litigation.
2. Newvac Corporation and Go 2 Galaxy, Inc., are both small tour operators located in Florida.

3. Jacques Cimetier is a private individual who is the President of Newvac Corporation and Go 2 Galaxy, Inc.

Amici in the Courts Below

The United States of America appeared as *Amicus Curiae* and filed briefs in both the District Court and Court of Appeals in support of the position of Respondents regarding the availability of *forum non conveniens* in an action governed by the Montreal Convention.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6

Respondents Newvac Corporation and Go 2 Galaxy, Inc. are corporations organized and existing under the laws of Florida with their principal place of business in Florida. There is no parent corporation or publicly held corporation owning 10% or more of the stock of Newvac Corporation or Go 2 Galaxy, Inc.

Respondent West Caribbean Airways, S.A., is a Colombian air carrier organized and existing under the laws of Colombia and currently is in bankruptcy. There is no parent corporation or publicly held corporation owning 10% or more of the stock of West Caribbean Airways, S.A.

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Plaintiffs' Oppositions to [Newvac] Motion to Dismiss on Grounds of Forum Non Conveniens, No. 06-22748, Doc. No. 170 (S.D. Fla. filed Oct. 19, 2007) 22

TREATY PROVISION INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734 ("Montreal Convention") and is reproduced in the Appendix ("Opp. App.") hereto at 12a-49a.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Newvac Corporation, Go 2 Galaxy, Inc. and Jacques Cimetier (hereinafter referred to collectively as "Newvac") and West Caribbean Airways, S.A. ("WCA") respectfully request that the Court deny the Petition for Writ of *Certiorari* ("Petition") seeking review of the opinion of the Court of Appeals for the Eleventh Circuit in this case which is officially reported at *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. Oct. 8, 2009) ("*Pierre-Louis*") and reproduced in the Appendix to the Petition ("Pet. App.") at App. 1-10. The decision of the District Court (1) with respect to the Montreal Convention is officially reported at *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. Sept. 27, 2007) ("*WCA I*") and reproduced in the Pet. App. at App. 21-87, and (2) granting dismissal of the *forum non conveniens* motion, *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. (S.D. Fla. Nov. 9, 2007) ("*WCA II*"), is not officially reported and is reproduced in the Pet. App. at App. 88-108.

STATEMENT OF THE CASE

This litigation arises from the August 16, 2005 crash in Venezuela of WCA Flight 708 while en route from Panama to Martinique. All of the 152 passengers and 8 crew members on board the aircraft perished in the accident. The passengers-decedents were residents of Martinique, a Department of France, and mainly citizens of France; none were citizens or residents of the United States.

Representatives of the 152 passengers-decedents involving over 665 Martinique beneficiaries filed three separate actions in the United States District Court for the Southern District of Florida against (1) WCA, a Colombian air carrier operating the chartered aircraft which conducted no business in the United States, (2) Newvac Corporation and Go 2 Galaxy, Inc., small tour operators based in Florida, and (3) Jacques Cimetier, the President of Newvac and Go 2 Galaxy, Inc.[1] These three actions filed by the *Bapte* Plaintiffs, the *Galbert* Plaintiffs and the *Cadare* Plaintiffs (collectively referred to herein as "Plaintiffs") were consolidated before the District Court below. Plaintiffs in each action sought to recover damages for the deaths of 152 the passengers-decedents pursuant to the terms of the Montreal

[1] Plaintiffs also sued WCA's insurer, Aseguradora Colseguros, S.A. (a Colombian corporation), Globe-Trotter de Riviere Salee Travel ("Globe-Trotter"), the Martinique travel agent which marketed the one-week trip from Martinique to Panama, MK Leasing (USA) (a Nevada corporation), and MK Capital, Inc, (a Nevada corporation). Aseguradora Colseguros never was served and was dismissed. The MK defendants and Globe Trotter and its owners were also dismissed from these actions.

Convention, which exclusively governs the rights and liabilities of passengers and carriers for passenger death occurring during the course of international carriage by air.

Petitioners herein are representatives of *Bapte* Plaintiffs who consist of 102 of the 152 passengers-decedents. The *Cadare* Plaintiffs settled their claims while the appeal was pending before the Eleventh Circuit and the *Galbert* Plaintiffs do not seek this Court to review the decisions of the Courts below.

The United States also appeared in the Courts below as *Amicus Curiae* in support of Respondents' position that the procedural doctrine of *forum non conveniens* continues to be available in an action governed by the Montreal Convention.

A. Relevant Facts

On March 25, 2005, Newvac entered into a charter contract with WCA in Colombia pursuant to which WCA was to provide a 152-passenger MD-82 aircraft and crew for round-trip flights from Martinique to Panama during May-August 2005. After entering into the charter contract with WCA, Newvac contracted with Globe Trotter, a Martinique travel agency, whereby it agreed to provide the WCA aircraft to Globe Trotter for a series of excursions between Martinique and Panama. These excursion packages were then sold by Globe Trotter to individual passengers in Martinique. Thus, contrary to the statements of Petitioners, Newvac was not a "clandestine airline" or the "*de facto* operator" of WCA. *See* Petition at 3-4. Newvac simply was a small tour operator and could not and did not provide any pilot training or

aircraft parts, airlines control fees, or assert any control over the WCA's flight operations or personnel.

The accident occurred on August 16, 2005, when the WCA aircraft crashed during a return trip from Panama following one of these excursions.

B. Relevant Proceedings in the Courts Below

While there was no dispute that the District Court had personal and subject matter jurisdiction over Newvac, WCA contested personal jurisdiction and Newvac contested the convenience of the Southern District forum.[2]

The District Court Decisions. Eventually, only WCA and the Newvac remained in the litigation. The accident, however, had little connection to the United States.[3] Although WCA was the

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[2] WCA filed a motion to dismiss for lack of personal jurisdiction which was held in abeyance pending disposition of the *forum non conveniens* motion. In addressing the Bapte Plaintiffs' Fed. R. Civ. P. 60(b) motion filed while this case was pending on appeal (*see* discussion *infra* at 7), the District Court noted that "[i]n contrast to the French court, this Court does not have personal jurisdiction over West Caribbean. . . ." *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. at 2 (S.D. Fla. Sept. 11, 2009) (reproduced Opp. App. at 5a-11a), *aff'd as amended sub nom. Bapte v. West Caribbean Airways*, 2010 WL 1141063 (11th Cir., Mar. 25, 2010) (reproduced Opp. App. at 1a-4a).

[3] All damage evidence and almost all relevant liability evidence was located outside the United States: (1) the damage evidence for the 152 passenger-decedents and approximately 665 beneficiaries is located in Martinique; (2) the accident occurred in Venezuela while en route from Panama to Martinique; (3) WCA is a Colombian certificated air carrier; (4) the flight crew of WCA Flight 708 were licensed in

only insured carrier able to satisfy any judgments resulting from this loss, Newvac was the only entity ("contracting carrier") capable of being sued in the United States. Based on this tenuous connection with the United States, and coupled with the facts that all the passenger-decedents were residents of Martinique, WCA had consented to jurisdiction in Martinique and WCA was (and currently is) in the process of defending and/or settling cases brought by certain plaintiffs in Martinique, Newvac moved for dismissal on grounds of *forum non conveniens*. WCA filed a Notice of Joiner in Newvac's motion.

The District Court by Preliminary Order dated September 27, 2007, found that Newvac was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention, and therefore, it had treaty subject-matter jurisdiction pursuant to Article 33.[4] *WCA I*, 619 F. Supp. 2d at 1305-08 (Pet. App. at App. 32-38). Next, the District Court addressed whether the Montreal Convention precluded the application of the procedural doctrine of *forum non conveniens* when a court has juris-

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Colombia; (5) the WCA aircraft was based, maintained and registered in Colombia; (6) the Venezuelan authorities investigated the accident with the assistance of the French authorities; and (7) Martinique/French substantive law likely would apply.

[4] Article 46 of the Montreal Convention provides that any action for damages against the actual or contracting carrier "must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business." Article 33 in turn sets forth 5 fora where the action must be brought.

diction pursuant to the Convention. The court found that this issue was answered by the unambiguous language of Article 33(4), which provides that "[q]uestions of procedure shall be governed by the law of the court seised of the case." *Id.* at 1310-11 (Pet. App. at App. 42-45). The District Court explained that because the *forum non conveniens* doctrine is part of United States civil procedure, the Convention unambiguously permits its application in accordance with the law of the forum. *Id.* The District Court found that this conclusion also was consistent with the Convention's drafting history and post-ratification understanding of the contracting states. *Id.* at 1311-28 (Pet. App. at App. 46-86).

In a second order dated November 9, 2007, the District Court addressed the merits of the *forum non conveniens* motion. *WCA II*, Pet. App. at App. 88-108. Newvac and WCA agreed not to contest liability as a condition for *forum non conveniens* dismissal. While Plaintiffs agreed that with respect to the Montreal Convention claims defendants' liability will not be at issue, they argued that actions should not be dismissed given defendants' likely assertion of third-party claims for contribution against, *inter alia*, U.S.-based manufacturers.[5] *WCA II*, Pet. App. at App. 99-100. Thus, the principle focus of the *forum non conveniens* inquiry was damages and the impact of defendants' potential third-party liability claims.

After considering the adequacy of the alternative forum (Martinique) and the deference owed to

[5] While Plaintiffs brought products liability actions against the aircraft manufacturers in Martinique, they did not bring similar actions in the United States.

the Plaintiffs' choice of forum, the District Court balanced each of the public and private interest factors and granted the *forum non conveniens* motion, finding that Martinique was the more convenient forum for resolution of the claims. *WCA II*, Pet. App. at App. 107-08. Plaintiffs appealed both rulings of the District Court.

Petitioners' Rule 60(B) Motion. In May 2009, while the appeal of the *forum non conveniens* dismissal was pending, the District Court denied a motion to dismiss the separate crew action against Newvac and numerous U.S.-based manufacturers on *forum non conveniens* grounds. *See In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. May 14, 2009). The motion was denied "mainly because the Court was not persuaded that a French (European Union) Court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela." *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. at 3, n. 4 (S.D. Fla. Sept. 11, 2009) (Opp. App. at 8a, n. 4). Viewing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, Petitioners herein (the *Bapte* Plaintiffs) filed a motion for relief from judgment with the District Court pursuant to Fed. R. Civ. P. 60(b). The District Court held that due to the pendency of the appeal, it lacked jurisdiction to rule on the Rule 60(b) motion but addressed the merits of the motion "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." Opp. App. at 6a. The Court noted that its order denying the motion to dismiss the crew cases on

forum non conveniens grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. *Id* at 10a. The District Court explained:

> The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court. [footnote omitted] While the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Carribean [sic] has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards. [footnote omitted] In contrast to the French court, this Court does not have personal jurisdiction over West Carribean [sic]—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product liability claims, even if

> permitted, is purely speculative and surely distant in resolution.

Opp. App. at 6a-7a.[6]

Petitioners' appealed. In a decision issued on March 25, 2010, the Court of Appeals affirmed the District Court's conclusion. *Bapte v. West Caribbean Airways,* 2010 WL 1141063 (11th Cir. Mar. 25, 2010) (Opp. App. at 1a-4a). While the Court of Appeals concluded that the District Court erred in holding it lacked jurisdiction to consider the motion, the Court found the error to be harmless "because the motion does not assert adequate grounds for relief from judgment. . . ." Opp App. at 3a.

The Court of Appeals Forum Non Conveniens Decision. On appeal, the *Bapte* and *Galbert* Plaintiffs argued that the *forum non conveniens* doctrine does not apply because the Montreal Convention precludes application of the doctrine as a matter of international law, and alternatively, even if the Convention permits application of the doctrine, the District Court

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[6] During the pendency of the passenger *forum non conveniens* appeal, the *Bapte* Plaintiffs also sued Newvac and WCA in Martinique pursuant to the Montreal Convention. Although the plaintiffs made marginal attempts to comply with the District Court's order to re-file their actions in Martinique within six months of dismissal, they did so with the sole intent to persuade the French courts to reject their claims. Opp. App. at 8a, n. 4. On August 24, 2009, the French court in Martinique issued an order rejecting the plaintiffs' claim that the French court lacked jurisdiction to entertain their claims and directed plaintiffs to submit proof of their damage claims to the court by October 23, 2009.

abused its discretion in applying it here. The Court of Appeals affirmed the decisions of the District Court finding no error or abuse of discretion. With respect to the availability of *forum non conveniens* in an action governed by the Montreal Convention, the Court of Appeals stated:

> We . . . find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state. As the district court correctly noted, the doctrine of forum non convenience is "firmly entrenched in the procedural law of the United States." In addition, we are satisfied that a district court may—where appropriate—exercise its discretion to apply forum non conveniens, without interfering with the implementation of the Convention, so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.

Pierre-Louis, 584 F.3d at 1058 (footnotes omitted and emphasis in original) (Pet. App. at App. 12-13).

The Court of Appeals also found that the District Court did not abuse its discretion in balancing the private and public interest factors and dismissing the claims on *forum non conveniens* grounds. *Id.* at 1059-62 (Pet. App. at App. 13-20). After the denial of rehearing, the *Bapte* Plaintiffs filed this Petition.

REASONS FOR DENYING THE WRIT

Petitioners present two questions for review based on an alleged conflict between the decision of the Court of Appeals below with (1) a decision of the Court of Appeals for the Ninth Circuit addressing *forum non conveniens* under the 1929 Warsaw Convention,[7] and (2) the decisions of this Court addressing the authority of a court to decide the issue of personal jurisdiction and *forum non conveniens* before its decides subject matter jurisdiction. These alleged conflicts are based upon an erroneous interpretation of the Montreal Convention and a misapprehension of the decisions cited by Petitioners. The decisions of the District Court and Court of Appeals are correct and do not conflict with any decision of this Court or any Court of Appeals. The Petition should be denied.

I

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE MONTREAL CONVENTION ALLOWS U.S. COURTS TO CONTINUE TO USE THE PROCEDURAL DOCTRINE OF *FORUM NON CONVENIENS*

The Montreal Convention issue presented to the Courts below was as a matter of first impression—whether the doctrine of *forum non conveniens*

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[7] Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C. § 40105.

continues to be available to a United States court in a case arising under the Montreal Convention.

Article 33 of the Montreal Convention sets forth five fora where an action for damages must be brought against the air carrier for passenger injury or death occurring during international carriage by air. Article 33(4), however, also clearly states that "[q]uestions of procedure shall be governed by the law of the court seised of the case."

Following well-settled rules of treaty interpretation,[8] the Courts below began with the words of the treaty in the context in which they are used and found that because there is no dispute that *forum non conveniens* is a "question[ ] of procedure" firmly entrenched in U.S. law, it clearly falls within the ambit of Article 33(4). *Pierre-Louis*, 584 F.3d at 1058 (Pet. App. at App. 11-12); *WCA I*, 619 F. Supp. 2d at 1305, 1310 (Pet. App. at App. 43). Thus, the Courts below found that the Montreal Convention does not prohibit the application of the doctrine *forum non conveniens* by the courts in the United States.

Petitioners argue that this decision of the Court of Appeals conflicts with *Hosaka v. United Airlines*, 305 F. 3d 989 (9th Cir. 2002), *cert. denied*,

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[8] As noted in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (internal citations and quotation marks omitted): "When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages. Moreover, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *See also El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

537 U.S. 1227 (2003), which they incorrectly characterize as the "only United States Appellate Decision to have interpreted the almost identical language contained" in Article 28(2) of the 1929 Warsaw Convention.[9] Petition at 6-8. Disagreeing with the Fifth Circuit, *Hosaka* held that "Article 28(1) of the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for *forum non conveniens*." *Hosaka*, 305 F.3d at 993. *Hosaka* found the text of Article 28(2) to be ambiguous and then turned to the treaty's purposes, its drafting history, as well as evidence of the parties' post-ratification understanding to support its conclusion. Central to the *Hosaka*'s court conclusion was its finding that because in 1929 the *forum non conveniens* doctrine was relatively unknown and did not exist as it does today, it would be improper to incorporate it into the Convention. *Id.* at 994-1003. When the Montreal Convention was drafted in 1999, however, the opposite was true—the doctrine had become a "valuable procedural tool" in the United States.

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[9] Prior to *Hosaka*, the Court of Appeals for the Fifth Circuit and other district courts had uniformly applied *forum non conveniens* under the Warsaw Convention. *See In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F. 2d 1147, 1160-62 (5th Cir. 1987) (*en banc*), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *vacated in part and aff'd in part on remand* 883 F.2d 17 (5th Cir. 1989); *Chukwu v. Air France*, 218 F. Supp. 2d 979, 985-87 (N.D. Ill. 2002); *In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207, 212-14 (S.D.N.Y. 1999): *Lu v. Air China Int'l Corp.*, 1992 WL 453646, *1, n.1 (E.D.N.Y. 1992); *see also Brinkerhoff Maritime Corp. v. P.T. Airfast Servs. Indonesia*, [1992] 2 S.L.R. 776, Lexsee 2 SLR 776 (Sing. C.A.) (declining on *forum non conveniens* grounds to adjudicate a case governed by the Warsaw Convention).

Id. at 1003; *see also Pierre-Louis*, 584 F.3d at 1058 (Pet. App. at App. 11-12); *WCA I*, 619 F. Supp. 2d at 1305, 1310-11 (Pet. App. at App. 43-46).

Without regard to *Hosaka*'s rationale and dismissing as irrelevant the fact that *Hosaka* interpreted the 1929 Warsaw Convention, Petitioners argue that the Court below disregarded *Hosaka*. Petition at 8. The Court below did not disregard *Hosaka* but correctly found it to be distinguishable because "both cases[10] involved the interpretation of the Warsaw Convention, a predecessor to the Montreal Convention drafted in 1929, at which time *forum non conveniens*, in its current form, was not recognized under U.S. law." *Pierre-Louis*, 584 F.3d at 1058, n.7 (Pet. App. at App. 12). Indeed, *Hosaka* expressly recognized it was not addressing the applicability of *forum non conveniens* under the Montreal Convention. *Hosaka*, 305 F.3d at 999-1001 & n.17.

Petitioners nevertheless argue that the Court below improperly considered these critical legal differences and should have ignored the clear language of Article 33(4) of the Montreal Convention and blindly followed *Hosaka* because drafters of the Montreal Convention retained "the language and substance of the Warsaw Convention in order to preserve the large body of judicial precedents" such as *Hosaka*. Petition at 9-10 (*citing* S. Exec. Rep. 108-08 at 3 (2003)). Assuming *Hosaka* was correctly decided, Petitioners overlook that when

[10] The Court also was distinguishing *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), a decision by the English Court of Appeals addressing *forum non conveniens* under the 1929 Warsaw Convention. Even *Hosaka* did not fully adopt the *Milor* rationale. *Hosaka*, 305 F.3d at 995-96.

the Montreal Convention was drafted in 1999, *Hosaka* had not even been decided and *forum non conveniens* was firmly entrenched in U.S. procedural law and often applied to Warsaw Convention cases. *See supra* note 9. In fact, there is no evidence in S. Exec. Rep. 108-08 or the accompanying statements cited by Petitioners (Petition at 9-11) that the United States relinquished *forum non conveniens* in the negotiations for the Montreal Convention. *See WCA I*, 616 F. Supp. 2d at 1327 (Pet. App. at App. 85-86); *cf. Greene v. Beard*, 523 U.S. 371, 375 (1998) ("it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

Unlike the drafting of the Warsaw Convention, the United States was an active participant in the drafting of the Montreal Convention and the issue of *forum non conveniens* was extensively discussed by the drafters. It was not "voted down" as Petitioners claim. Petition at 10. As the Courts below found, the "history of the Convention is clear that it was the shared intent of the states party that each state could continue to apply its procedural rules, including *forum non conveniens*." *Pierre-Louis*, 584 F. 3d at 1058 n. 8 (Pet App. at App. 13). The District Court summarized the Montreal Convention drafting history as follows:

> What the . . . drafting history shows is that no State advanced a proposal which if adopted would have precluded the application of *forum non conveniens* to Montreal Convention cases in the courts of States adhering to the doctrine. Instead,

> it shows that the doctrine was extensively discussed, mainly with respect to the creation of the fifth jurisdiction, that proposals addressing the doctrine were advanced, including proposals which would have made *forum non conveniens* applicable only to the fifth jurisdiction or clarified its applicability to all jurisdictions, and that the United States actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention and other international cases. In the end, the consensus among the delegates was to omit any language respecting the applicability of *forum non conveniens* to avoid imposing the doctrine on States that do not employ it and distorting its application in States where it is commonly employed. In other words, the delegates determined to maintain the status quo: signatory countries employing the doctrine would continue to do so pursuant to subsection [4]: "Questions of procedure shall be governed by the law of the court seised of the case," and signatory countries that do not employ the doctrine would not be required to adjust their legal systems to accommodate the doctrine in cases arising under the Convention.

WCA I, 619 F. Supp. 2d at 1326 (Pet. App. at App. 81-82). Petitioners do not dispute the accuracy of

this drafting history; they simply ignore it, as they ignore the plain language of Article 33(4).

If the Court of Appeals followed *Hosaka*, it not only would have failed to give effect to the clear language of Article 33(4)[11] and the Convention's drafting history, but the views expressed by the United States on this issue. While Petitioners agree that "[r]espect is ordinarily due to the reasonable views of the Executive Branch concerning the meaning of an international treaty" (Petition at 10)[12], they fail to advise the Court that the United States filed Amicus Briefs in the Courts below supporting the position of Respondents with respect to the continued availability of *forum non conveniens* under the Montreal Convention. This position was summarized concisely in the United States Amicus Brief filed in the Court of Appeals:

> The Montreal Convention does not prohibit a U.S. court from applying *forum*

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[11] As noted by the District Court: "It also avoids the need to graft language onto subsection [4] so that it would read: 'Questions of procedure, other than *forum non conveniens*, shall be governed by the law of the court seised of the case'—a result the law plainly does not permit." *WCA I*, 619 F. Supp. 2d at 1311 (Pet. App. at App. 44-45). *See Chan v. Korean Air Lines*, 490 U.S. 122, 134-35 (1989) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation or power, and not an exercise of judicial functions.") (*quoting The Amiable Isabella*, 19 U.S. 1, 71 (1821)).

[12] *See Tseng*, 525 U.S. at 168 ("[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight") (*quoting Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

non conveniens in a case governed by the Convention. The text of the treaty provides that the respective domestic laws of the Parties will govern questions of procedure. *See* Art. 33(4). Under U.S. law, *forum non conveniens* is a procedural doctrine of general applicability. Application of *forum non conveniens* is also consistent with the general principle that a forum state's procedural rules apply under a treaty absent an express statement to the contrary.

It is unnecessary to look beyond the plain language of Article 33(4), but even if that text were ambiguous, the Montreal Convention's drafting history would support application of *forum non conveniens*. Prior to the drafting of the Montreal Convention, U.S. courts had uniformly applied the doctrine of *forum non conveniens* under the Warsaw Convention, and the delegates of the Montreal Convention envisioned that the doctrine would continue to apply in countries in which it had previously been recognized, including the United States. The historical record of the Montreal Convention's transmittal to and approval by the Senate similarly manifests the view of the President and the Senate that the Montreal Convention permitted the application of past precedent under the Warsaw Convention. Finally, significant weight is due to the Executive's view that the Montreal Convention permits application of *forum non conveniens*.

> The plaintiffs rely on *Hosaka* v. *United Airlines*, 305 F.3d 989 (9th Cir. 2002), and *Milor* v. *British-Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), but those decisions—interpreting a different convention—do not overcome the plain language, negotiating history, U.S. ratification history, and Executive Branch construction of the Montreal Convention. *Hosaka* and *Milor* rely heavily on the unsettled nature of *forum non conveniens* in 1929, when the Warsaw Convention was drafted, and the lack of any evidence that the Warsaw Convention's drafters intended to incorporate the doctrine. In contrast, the Montreal Convention was drafted against a background of U.S. courts' application of *forum non conveniens* in Warsaw Convention cases and the statements of delegates that this practice would continue under the Montreal Convention. Finally, in *Hosaka*, the Executive had not provided its authoritative interpretation of the treaty. This Court should affirm the district court's holding that the Montreal Convention does not foreclose application of *forum non conveniens*.

Brief of the United States as Amicus Curiae In Support of Defendants-Appellees, No. 07-15828 at 7-8 (11th Cir. filed May 15, 2008). *See also WCA I*, 619 F. Supp 2d at 1328 (Pet. App. at App. 85-86).

Petitioners' arguments are presented without regard to the position of the United States and as if the Montreal Convention never existed. If this was a 1929 Warsaw Convention case, Newvac and

WCA would agree that a conflict exists between *Hosaka* and the decision of the Court of Appeals below. However, this case is governed by the Montreal Convention—a separate treaty with its own distinct drafting history and expectations of the contracting States.

The Court of Appeals properly decided to conduct a full analysis of the issue under the 1999 Montreal Convention rather than follow *Hosaka* which interpreted another treaty from another time. There is no conflict and the Petition should be denied.

II

THE COURT OF APPEALS DECISION FINDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING *FORUM NON CONVENIENS* DISMISSAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The second question presented for review is equally without merit. Petitioners claim that the decision of the Court of Appeals below conflicts with *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007) and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

Petitioners attempt to manufacture a conflict with *Sinochem* and *Ruhrgas* by arguing that the District Court's consideration of Newvac's and WCA's conditional liability concession was a resolution of the liability on the merits and any *forum non conveniens* analysis as to damages thereafter was "too late" and contrary *Sinochem*

and *Ruhrgas*. Petition at 11-13.[13] This argument, not presented to the Courts below, demonstrates a fundamental misapprehension of *Sinochem* and *Ruhrgas* and ignores the posture of the case below when the issue was addressed by the Courts below.

In *Ruhrgas*, the Court held that there is no mandatory sequencing of jurisdictional issues. *Ruhrgas*, 526 U.S. at 584. Thus, a court may dismiss a case for lack of personal jurisdiction without first establishing subject-matter jurisdiction. *Id.* at 578. In *Sinochem*, the Court held that it was not required to first definitively ascertain its own jurisdiction before dismissing a case under the *forum non conveniens* doctrine. *Sinochem*, 549 U.S. at 433-34. The basic premise underlying both *Sinochem* and *Ruhrgas* is that resolution of a court's jurisdiction is vital only if the court proposes to issue a judgment on the merits. Because *forum non conveniens* or personal jurisdiction are threshold non-merit issues which do not entail any assumption by the court of substantive "law-declaring powers," the resolution of these issues can precede a subject-matter inquiry. *Sinochem*, 549 U.S. at 433.

Unlike *Sinochem* and *Ruhrgas*, there was no dispute that the District Court below had jurisdiction over Newvac (personal and subject matter) and, therefore, was fully competent to resolve the case on a merit or non-merit (*forum non conve-*

[13] Contrary to what Petitioners imply (Petition at 4, 12), discovery was limited to the issues related to *forum non conveniens* and personal jurisdiction over WCA. *See* Joint Status Report, No. 06-22748, Doc. No. 155 at 4 (S.D. Fla. entered Aug. 31, 2007).

niens) basis. Although it was fully competent to do so, the District Court did not render a decision on the merits; it simply held that the merits need to be determined elsewhere.

Petitioners also ignore that "the parties agree[d] that with respect to the Montreal Convention claims, Defendants' liability will not be at issue" and that the principle contention will be the amount of damages. *WCA II*, Pet. App. at App. 99. Here, liability was irrelevant with respect to the Convention claims, not only because Newvac and WCA agreed not to contest liability, but also because, as Petitioners argued, Article 21 of the Convention creates a virtual strict liability regime and the only defense available to Newvac/WCA was to establish that they had "zero" percent liability which would be virtually impossible. Thus, Petitioners viewed the conditional concession of liability not as impermissible but as "meaningless" because "liability will not be an issue in *any* forum" and that "there will be no trial of their liability in *any* forum." Plaintiffs' Oppositions to [Newvac] Motion to Dismiss on Grounds of Forum Non Conveniens, No. 06-22748, Doc. No. 170 at 2, 10 (S.D. Fla. filed Oct. 19, 2007) (emphasis in original); *see* Joint Status Report, No. 06-22748, Doc. No. 155 at 4 (S.D. Fla. filed Aug. 31, 2007) ("*Plaintiffs' Position*: Should the Montreal Convention be found applicable to this matter, plaintiffs believe that their claims will likely require trials on damages only, since Article 21(2) of the Convention imposes on carriers strict liability up to approximately $150,000, and imposes on the carrier the burden of proving it is entirely without fault in order to escape liability. . . ."). In any event, the conditional concession of liability by Newvac and

WCA was an appropriate factor for the District Court to consider, especially in light of Petitioners' arguments and the procedural posture of the case.[14] Accordingly, the decision of the Court of Appeals in no way conflicts with *Sinochem* and *Ruhrgas*.

Petitioners' remaining arguments relating to Newvac's alleged waiver of venue and the alleged improper application of the *forum non conveniens* factors by the District Court (Petition at 13-14) similarly are without merit and do not present a reason to grant *certiorari*. Petitioners offer no legal basis for their newly presented venue waiver argument.

Even if there was some valid legal basis for this venue argument, Petitioners overlook that Newvac's and WCA's offer to concede liability was con-

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[14] *See Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1315 (11th Cir. 2001) (giving weight to defendants' concession of liability if case were tried in the country in which the airplane crashed); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 614-15 (3d Cir. 1991) (finding dismissal inappropriate where there had been extensive merits discovery and the balance of the private and public interest factors was close, but providing that the "district court may re-enter its order dismissing on forum non conveniens grounds if Du Pont, within 30 days of the remand, makes a further concession which eliminates liability as a relevant issue"); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 805 (E.D. Pa. 1987) (liability concession would make trial a simple issue of appropriate damages and balance of convenience regarding first private interest factor weighs in favor of dismissal); *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 500 & n 7 (S.D.N.Y. 2007) (agreement not to contest liability is appropriate factor to consider but even without it dismissal appropriate).

ditional on *forum non conveniens* dismissal. Thus, there could be no waiver.

Finally, a review of the District Court decision clearly evidences that it considered each and every relevant private and pubic interest factor in its *forum non conveniens* analysis. *WCA II*, Pet. App. at App. 98-107. The District Court even considered Petitioners' arguments related to the possible assertion by the defendants of third-party liability claims against U.S.-based manufacturers and found that it did not alter the propriety of *forum non conveniens* dismissal. *WCA II*, Pet. App. at App. 95. The Court of Appeals reviewed the District Court's analysis and found no abuse of discretion. *See Pierre-Louis*, 584 F.3d at 1059-62 (Pet. App. at App. 13-20).

The Courts below committed no error and their decisions do not conflict with *Sinochem* or *Ruhrgas*.

CONCLUSION

The Petition fails to set forth any reason for review to be granted—there is no conflict with the drafters' intent or express language of the Montreal Convention; there is no conflict among the Circuits; and there is no conflict with the decisions of this Court. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 5, 2010

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15175
Non-Argument Calendar
Filed March 25, 2010

D.C. Docket No. 06-22748-CV-UU

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE,

Plaintiffs-Appellants,

—versus—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before TJOFLAT, WILSON and COX,
Circuit Judges.

PER CURIAM:

In August 2005, while en route from Panama to Martinique, West Caribbean Airlines, S.A. Flight 708 crashed in Venezuela, killing all passengers and crew on board. Representatives of the passengers filed several lawsuits, which were consolidated in the United States District Court for the Southern District of Florida. They asserted wrongful death and strict liability claims against Defendants West Caribean Airlines, Newvac Corporation, Go 2 Galaxy, Inc., and Jacque Cimieter pursuant to 28 U.S.C. § 1369. In addition, representatives of the crew members brought products liability lawsuits against manufacturers of the airplane and negligence suits against Newvac in the same district court. The crew cases were consolidated with one another, but were not consolidated with the passenger cases.

In November 2007, the district court dismissed the passenger cases on *forum non conveniens* grounds, and the passengers' representatives appealed. We affirmed the district court's order dismissing the cases in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In May 2009, while the appeal of the dismissal was still pending, the district court denied a motion to dismiss the crew cases on *forum non conveniens* grounds. Believing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, the representatives of the passengers filed a motion for relief from judgment with the district court. *See* Fed. R. Civ. P. 60(b).

The district court issued an order on the Rule 60(b) motion while the appeal of its dismissal of the passenger cases was still pending. It held that due to the pendency of the appeal, it lacked jurisdiction to rule on the motion for relief from judgment. (R. 19-251 at 1.) Even so, the court addressed the merits of the motion and wrote "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." (*Id.*) The court explained that "[t]he Motion is based on no just or equitable reason which warrants relief" (*id.* at 2), and its order denying the motion to dismiss the crew cases on *forum non conveniens* grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. (*Id.* at 4.)

After review of the record, we conclude that the district court erred in holding it lacked jurisdiction to consider the motion. We have held that a district court retains jurisdiction to consider a Rule 60(b) motion for relief from judgment even after an appeal of the judgment from which relief is sought has been noticed. *See Parrott v. Wilson*, 707 F.2d 1262, 1266-67 n.8 (11th Cir. 1983) (citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976); *Ferell v. Trailmobile, Inc.*, 223 F.2d 697, 698-99 (5th Cir. 1955)). Nevertheless, because the motion does not assert adequate grounds for relief from judgment, we conclude that the erroneous jurisdictional ruling was harmless, and we affirm the denial of relief.

The passengers' representatives argue that the denial of the motion to dismiss the crew cases created an automatic right, under 28 U.S.C. § 1369,

for the passengers to intervene in the crew cases. They argue that the denial established the Southern District of Florida as the appropriate forum for resolving any claim arising out of the crash of Flight 708 and constituted changed circumstances justifying relief under Rule 60(b)(5) and/or (6). We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases. (R. 19-251 at 4.) We agree that its denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable. (*Id.*)

The district court had jurisdiction to consider the Rule 60(b) motion, but the motion did not assert appropriate grounds for relief from judgment. Therefore, we vacate denial of the motion for want of jurisdiction, and amend the order to deny the motion on the merits. We affirm the order as amended.

ORDER AMENDED AND AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By : /s/ [Illegible]
Deputy Clerk
Atlanta, Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, *et al.*

ORDER ON MOTION FOR RULE 60(B) RELIEF

THIS CAUSE is before the Court on the "Bapte" Plaintiffs' Motion For Rule 60(b) Relief and Incorporated Memorandum of Law in Support (the "Motion") (D.E. 247) and Request for Oral Argument (D.E. 248), both filed on August 28, 2009.

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. The Motion seeks relief from this Court's Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*, entered on November 18, 2007 (the "FNC Order"). (D.E. 184.) In the FNC Order, the Court dismissed the actions of the passengers, including those of the "Bapte" Plaintiffs, against Defendants West Caribbean Airlines, S.A. ("West Caribbean"), Newvac Corporation ("Newvac"), and

Go 2 Galaxy, Inc. ("Go 2") under the Montreal Convention and directed the passengers to pursue their remedies in the French court in Martinique.[1]

The FNC Order to which the Motion is directed is on appeal and oral argument is scheduled for September 23, 2009. Due to the pendency of the appeal, this Court lacks jurisdiction to rule on the instant motion. Nonetheless, the Court writes to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion.

The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court.[2] While

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[1] This case arises of the August 16, 2005 crash of an airplane operated by West Caribbean, a Columbian airline. The crash occurred in Venezuela. Newvac chartered the aircraft for Go 2, a Martinican travel agency, for a series of round-trip flights between Martinique and Panama. The deceased passengers were mainly French citizens and residents of Martinique—none were United States domiciliaries.

[2] This strategy consists of three parts: first, petitioning the French court in Martinique to decline jurisdiction over the passengers' Montreal Convention claims (which effort was rejected by the French court on August 24, 2009); second the filing of a motion to intervene in the product-liability actions brought in this District by the representatives of the estates of the deceased crew members, notwithstanding that the "Bapte" Plaintiffs represented in their opposition to the motion to dismiss the passengers' cases on the grounds of *forum non conveniens* that resulted in the FNC Order that they would not pursue such claims; and

the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Caribbean has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards.[3] In contrast to the French court, this Court does not have personal jurisdiction over West Caribbean—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product-liability claims, even if permitted, is purely speculative and surely distant in resolution.

In the Motion, the "Bapte" Plaintiffs argue that the Court's May 14, 2009 Order Denying the Defendants' Motions to Dismiss on the Grounds of *Forum Non Conveniens* in the companion, consolidated "Crew Member Case" (Case No. 07-22015-Civ-Ungaro, D.E. 321) now makes it apparent that there will be duplicate litigation arising out of the

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third, this Motion which argues that circumstances somehow have changed since entry of the FNC Order favoring litigation in this District by reason of the pendency of the product-liability claims of the representatives of the deceased crew members, despite the fact that such cases have been pending since August 2007.

[3] West Caribbean has approximately 450 million euros in coverage for the claims arising from the accident.

crash in both this Court and the French court in Martinique which could yield inconsistent results.[4] However, the passengers' Montreal Convention claims in the French court and the product-liability Crew Member Case in this Court are materially distinct and pose no danger of inconsistent results. With respect to liability; in Montreal Convention cases, the airline's fault is presumed; while in the product-liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees, and owners must be resolved. In

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[4] Actually, this Court, in the Crew Member Case, denied a *forum non conveniens* motion seeking a transfer to the French court on September 30, 2008, nearly a year ago; the motion was denied mainly because the Court was not persuaded that a French (European Union) court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela. The May 14, 2009 order in the Crew Member Case denied a *forum non conveniens* motions seeking a transfer to Columbia.

What really prompted the filing of this Rule 60(b) motion is that after this Court issued the FNC Order, the "Bapte" Plaintiffs sought to persuade the French court to decline to exercise jurisdiction over their Montreal Convention claims. The Court infers that the purpose of this exercise was to be able to argue to the Court of Appeals that the French court was not an alternative available forum for the Montreal Convention claims and that therefore the FNC Order should be reversed. This effort, however, came to a conclusion on August 24, 2009 when the French court ruled that it had jurisdiction and ordered the "Bapte" Plaintiffs to submit proof of their damages by October 23, 2009. This Rule 60(b) Motion followed four days later. The failed attempt in Martinique to frustrate this Court's duly entered order hardly qualifies as a just or equitable reason for relief under Rule 60(b).

fact, in the Montreal Convention cases pending in the French court, West Caribbean, over which this Court cannot assert jurisdiction, has appeared and both conceded liability and waived the damage caps. And under any theory of liability, the passengers' estates will be entitled to but one recovery for wrongful death and those damages will have to be assessed in accordance with the law of the place with the most significant relationship to the issue of damages. *See, e.g., Harris v. Berkowitz,* 433 So. 2d 613 (Fla. 3d DCA 1983). In the case of the "Bapte" Plaintiffs, for example, that assessment likely will be made under the law of their domicile regardless of forum location.[5] *See id.*

The "Bapte" Plaintiffs also argue that somehow the Court's May 13, 2009 order denying the motion to dismiss *on forum non conveniens* grounds in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash. However, the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster, and this Court has been exercising that jurisdiction since 2006. It was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the

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[5] The undersigned concedes that, depending on the forum, the damages awards might or might not be made by a jury. But speculation that a jury award might be greater than a non-jury award is not a just or equitable reason warranting Rule 60(b) relief from the FNC Order.

wrongful death claims arising under the Montreal Convention in the French court in Martinique.[6]

Finally, the Court notes that, although not argued as a ground for Rule 60(b) relief, the "Bapte" Plaintiffs have moved to intervene in the consolidated Crew Member Case and therefore may contend that they should not be required to litigate in two fora. However, it is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.

In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion For Rule 60(b) Relief and Incorporated Memorandum

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[6] That a federal court may have jurisdiction over an action does not moot the doctrine of *forum non conveniens*. In fact, only in limited circumstances may a court apply the doctrine before jurisdiction is established. *See Sinochem Intern. Co. Ltd. v. Malaysia Inter. Shipping Corp.*, 549 U.S. 422, 432 (2007).

of Law in Support (D.E. 247) is DENIED FOR LACK OF JURISDICTION. It is further

ORDERED AND ADJUDGED that the Request for Oral Argument (D.E. 248) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2009.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate

means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1—Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has

been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2—Carriage Performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3—Passengers and Baggage

1. In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4—Cargo

1. In respect of the carriage of cargo, an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5—Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

Article 6—Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7—Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8—Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9—Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10—Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other

person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 11—Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12—Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13—Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14—Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15—Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties

whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16—Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 17—Death and Injury of Passengers—Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or

in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18—Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19—Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20—Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21—Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22—Limits of Liability in Relation to Delay, Baggage and Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that

case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the

carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23—Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary

Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of

paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 24—Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liabil-

ity. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25—Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26—Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and

void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27—Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28—Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29—Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the

right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30—Servants, Agents—Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved

by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32—Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33—Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

Article 34—Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability

of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35—Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36—Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to

the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37—Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 38—Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 39—Contracting Carrier— Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual car-

rier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40—Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41—Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any spe-

cial agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42—Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43—Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44—Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45—Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46—Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47—Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48—Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Other Provisions

Article 49—Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 51—Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in to case of carriage performed in extraordinary circumstances outside the normal scope of a carrier business.

Article 52—Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

Chapter VII

Final Clauses

Article 53—Signature, Ratification and Entry into Force

1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28

May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5. Instruments of ratification, acceptance, approval or accession shall be deposited with the

International Civil Aviation Organization, which is hereby designated the Depositary.

6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8. The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 54.

Article 54—Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55—Relationship with other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

(a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

(c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56—States with more than one System of Law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and

(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57—Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

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No. 09-1199

SUPREME COURT, U.S.
FILED
MAY 21 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SYLVIA BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, NEWVAC CORPORATION, GO 2 GALAXY, INC., JACQUES CIMETIER, and ASEGURADORA COLSEGUROS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Countries that participate in the Warsaw System and that signed the Montreal Convention seek, as a cardinal purpose, to achieve uniform rules governing claims arising from international air transportation. This includes the express right of a plaintiff to select where to file suit. In the instant, Respondents seek to have the doctrine of *forum non conveniens* ["*FNC*"] applied to defeat the right of a claimant to bring a Montreal Convention claim in a country such as the United States and to use *FNC* as an escape hatch for Respondents to avoid venue in the United States. This case demonstrates how the application of *FNC* undermines the treaty's goal of achieving uniformity in how claims arising from international air transportation are handled by signatory nations. The application of *FNC* in this action has resulted in the representatives of the passengers being dismissed to Martinique while allowing the crew members' claims to proceed in the District Court. In the end, allowing the application of *FNC* to override a claimant's choice of forum which redirects litigants to different parts of the world depending on where they are from, where they sat on the plane, or based upon the types of claims they seek to bring in suit, disrupts and frustrates the uniform handling of claims arising from international air transportation—undermining the cardinal purpose of the Warsaw System.[1] Neither is it

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[1] *See American Dredging v. Miller*, 510 U.S. 443, 444 (1994) (the doctrine of *FNC* "is most unlikely ever to produce uniform results").

lawful that a Respondent such as Newvac, whose home offices are located in Florida, can use the treaty to 'forum shop' by stipulating to liability and then seeking *FNC* dismissal to transfer the case to a foreign country for assessment of significantly reduced damages.

I. RESPONDENTS' STATEMENT OF THE CASE IS INACCURATE

Respondents' Statement of the Case and Facts can best be described as a rehash of failed arguments rejected by both Courts below. Despite the District Court's contrary findings, affirmed on appeal, Respondents resuscitate these failed arguments and present them to this Court as irrefutable factual evidence. *See Pierre-Louis v. Newvac Corp.*, 548 F.3d 1052, 1057 (11th Cir. 2009).

In their Statement of the "Relevant Facts", Respondents attempt to disavow their undeniable responsibility and to distance themselves from this air disaster that killed 152 passengers so as to justify the improper application of *FNC*. Respondents state:

> "Thus, contrary to the statements of the Petitioners, Newvac was not a 'clandestine airline' or the 'de facto operator' of WCA. *See* Petition at 3-4. Newvac simply was a small tour operator and could not and did not provide any pilot training or aircraft parts, airline control fees, or assert any control over WCA's flight operations or personnel."

(Opp. Brief, pp. 3-4.) The Eleventh Circuit explicitly rejected these same contentions when it affirmed the District Court's findings that Newvac assumed the role of "carrier":

> The district court properly concluded that because "Newvac *knowingly assumed the responsibility* to supply the aircraft and crew, and to otherwise conduct itself as a carrier, for the transportation of Globe Trotter's customers," it was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention. The court correctly rejected Newvac's argument that because the actual passengers were not known to Newvac at the time it contracted with Globe Trotter, Newvac could not be a "contracting carrier" under the Convention. The Newvac-Globe Trotter contract clearly provided that Globe Trotter would procure passengers for the flights and tour packages that would be supplied by Newvac and that, once the passengers had been procured, Globe Trotter would forward their information to Newvac so Newvac could issue the relevant travel documents, including individual passenger tickets. Emphasis added.

Pierre-Louis, *supra*, fn. 6.

In sum, Respondents failed to accurately state the evidence to present themselves as disconnected from the operations of WCA; presumably to justify the application of *FNC*. Newvac's home office is in South Florida, its conduct as a carrier occurred in South Florida and that is where

Newvac should be tried. Respondents' representations of the "Facts" are inaccurate and all arguments based thereon should be disregarded.

II. THE RULE 60(b) MOTION

Respondents reference a Rule 60(b) Motion in their brief that is not at issue in the instant appeal. Shortly after the passengers were dismissed to Martinique on *FNC* grounds, the District Court denied *FNC* dismissal of the crew members' suits. That *FNC* ruling was so markedly different from the passengers' *FNC* ruling, that a Rule 60(b) Motion was filed. The Motion was denied and the Eleventh Circuit affirmed.

III. THE CONFLICT BETWEEN THE FIFTH AND NINTH CIRCUIT COURTS OF APPEALS OVER WHETHER *FORUM NON CONVENIENS* WAS AVAILABLE UNDER THE PRIOR WARSAW CONVENTION CONTINUES TO PRESENT A CONFLICT FOR CLAIMS BROUGHT UNDER THE CURRENT MONTREAL CONVENTION

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2, U.S. Constitution.

Although the doctrine of *FNC* has generated numerous decisions from this Court,[2] its application to an international treaty such as the Montreal Convention remains unsettled. When this Court has addressed the Warsaw Convention,[3] as the precursor to the Montreal Convention,[4] it has sought to ascribe to it a, "meaning consistent with the shared expectations of the contracting parties." *El Al Airlines, v. Tseng*, 525 U.S. 155 (1999).

The Ninth Circuit has also recognized that, "The Supreme Court repeatedly has counseled against adopting an interpretation of the [Warsaw] Convention that would have been discordant or offensive to the majority of signatories". *Hosaka*, 305 F.3d at 998 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003) (citing *Floyd, supra*; and *Zicherman, supra)*. But, the interpretation urged by Respondents and given by the Eleventh Circuit Court in the instant case is discordant with the Montreal Convention, just as the same interpretation was determined to offend the majority of the signatories to the Warsaw Convention. *See Milor v. British Airways*, [1996] Q.B. 702, 706

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[2] *See e.g., Sinochem, infra; Ruhrgas, infra; Gulf Oil v. Gilbert*, 330 U.S. 501 (1947); *American Dredging, supra*; and *Piper v. Reyno*, 454 U.S. 235 (1981).

[3] *See also Olympic Airways v. Husain*, 540 U.S. 644 (2004); *Zicherman v. KAL, Ltd.*, 516 U.S. 217 (1996); *Eastern Airlines, v. Floyd*, 499 U.S. 530 (1991) (cases cited); and *TWA, Inc. v. Franklin Mint*, 466 U.S. 243 (1984).

[4] The Montreal Convention was intended to "harmonize the hodgepodge of supplementary amendments and intercarrier agreements" which comprised the Warsaw Convention. *Ehrlich v. American Airlines*, 360 F.3d 366 (2d Cir. 2004).

(Eng.C.A.) ("I think it would be surprising if the high contracting parties had preserved to that small minority of countries which applied the doctrine of *FNC* a power to affect the choice of the forum in which a dispute should be tried by a process unknown to a majority of the parties"). Respondents' suggestion, as adopted by the Circuit Court, that the Montreal Convention is a 'new treaty' susceptible to new interpretation was likewise erroneous.

Article 28(2) of the Warsaw Convention, which provided that "Questions of procedure shall be governed by the law of the court to which the case is submitted", is the subject of an unsettled conflict between the Fifth and Ninth Circuits. *See Hosaka* and *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982.*[5] The Fifth and Ninth Circuits disagree about whether Article 28(2) of the Warsaw Convention is ambiguous and

[5] Respondents claim that Petitioners mischaracterized *Hosaka* when they referred to it as the "only United States **appellate** decision to have interpreted the almost identical language contained" in Article 28(2) of the 1929 Warsaw Convention" citing several cases. (Opp. Brief, pp. 12-13.) Of the cases cited by Respondents, *In Re Aircrash New Orleans*, 883 F.2d 17 (5th Cir. 1989) did not result in an *FNC* dismissal, was vacated by *Pan American v. Lopez*, 490 U.S. 1032 (1989), and remanded. The remainder of the cases are inferior District Court decisions, none of which "applied forum non conveniens under the Warsaw Convention" to dismiss Warsaw Convention claims. (*Cf.* Opp. Brief, p. 13 fn. 9.) Perhaps Petitioners should have clarified that *Hosaka* remains the only Appellate decision to have interpreted Article 28(2) of the Warsaw Convention and to have not been vacated or the subject of adverse action by a reviewing Court. At most, Respondents' contention serves to solidify the necessity of this Court's review to resolve a pending conflict.

permits *FNC* dismissal. The Fifth Circuit, in holding that the Warsaw Convention permitted *FNC* challenge, reasoned that the "interests of the federal forum in self-regulation, in administrative independence, and in self-management" were more important than the uniformity which the Warsaw Convention attempted to accomplish. 821 F.2d at 1159. When the Ninth Circuit considered the language of Article 28(2) of the Warsaw Convention (which mirrors the language again utilized in Article 33(4) of the Montreal Convention) it recognized the absence of any text "on the availability of the doctrine of forum non conveniens". *Hosaka*, 305 F.3d 990. When the Warsaw Convention was drafted, *FNC* was not well established. *Id.* at 994-1003. When the Montreal Convention was negotiated, *FNC* was recognized but was still alien to many countries. *Id.* at 1003. So, the United States delegates proposed a draft of Article 33(4) which provided that, "Questions of procedure shall be governed by the law of the court seised of the case, including the doctrine of forum non conveniens or similar doctrines . . .", but ". . . the final version of the Montreal Convention did not include the proposed language". *Hosaka*, 305 F.3d at 1000.[6] Regardless of whether the inclusion of *FNC* language lacked sufficient support to make it to a vote, the Montreal

[6] After the United States failed to get *FNC* included into the Montreal Convention, the delegates to the Montreal Convention agreed 'to maintain the status quo', as Respondents acknowledge on page 16 of their Brief. If the signatories agreed to maintain the existing 'status quo' as to *FNC*, then there could be no change, and certainly no 'new treaty' from which the application of *FNC* could suddenly spring. This shows the defect in the 'new treaty' argument and the

Convention still carries on the Warsaw Convention's ambiguity which was never settled.

The Montreal Convention modernized the Warsaw System and shifted away from the Warsaw Conventions' goal of protecting the "fledgling" airline industry to favoring the passengers. *See Ehrlich*, 360 F.3d at 371, fn. 4; and *Floyd*, 499 U.S. at 546. Although Article 33(4) of the Montreal Convention, ("Questions of procedure shall be governed by the law of the court seised of the case"), was derived almost verbatim from Article 28(2) of the Warsaw Convention ("Questions of procedure shall be governed by the law of the court to which the case is submitted"), and although conflict remains between the Fifth and Ninth Circuits over whether an *FNC* challenge could interfere with a claimant's forum selection, the Eleventh Circuit has now weighed into that conflict as well. *See Pierre-Louis*, 584 F.3d at 1058. Despite the intent of the Montreal Convention to give passengers greater rights, Respondents urge an interpretation that would favor air carriers and their insurers by allowing the doctrine of *FNC* to interfere with the right of passengers to select the forum where they bring their claims. (Montreal Convention, Art. 33(1), Pet. at 2.) Regardless, the Circuit Court reasoned that because the applicable treaty is the Montreal Convention, which it considered a 'new treaty', and not the Warsaw Convention, it held that Article 33(4) of the Montreal Convention

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error of the District Court and the Circuit Court in concluding and affirming that the Montreal Convention, as a 'new treaty', spontaneously provided for the application of *FNC*. Further, such an interpretation creates a likely separation of powers problem.

unambiguously allows an *FNC* challenge despite *Hosaka* and the drafting history. *Pierre-Louis*, 584 F.3d at 1058 fn. 7.

The Montreal Convention should be construed consistent with the manner in which similar provisions of the Warsaw Convention were interpreted. As one District Court explained,

> "Though the Montreal Convention replaced the Warsaw Convention, it intentionally 'contain[ed] provisions which embrace similar language as the Warsaw Convention.' *Watts v. American Airlines*, 2007 WL 3019344, *2 (S.D.Ind. Oct. 10, 2007). This was done in an effort to avoid "a complete upheaval of the common law surrounding the Warsaw Convention." *Id.*

Yahya v. Yemen Airways, 2009 WL 3424192, *4 (E.D. Mich. 2009). This proposition is not new or novel, since "The Explanatory Note to the Montreal Convention states that 'it is expected' that the provision of Article 17 governing carrier liability for passenger injury and death will be 'construed consistently with the precedent developed under the Warsaw Convention and its related instruments.'" *Schaefer-Condulmari v. U.S. Airways*, 2009 WL 4729882 (E.D. Pa. 2009). Not surprisingly, United States courts have relied on interpretations of similar provisions in the Warsaw Convention when construing the Montreal Convention. *Booker v. BWIA Airways*, 307 Fed.Appx. 491 (2d Cir. 2009) (interpreting Warsaw Convention as precedent in Montreal Convention case); *Bassam v. American Airlines*, 287 Fed.Appx. 309, 313 (5th Cir. 2008) (recognizing importance of relying on cases interpreting War-

saw Convention in case governed by Montreal Convention); *Gustafson v. American Airlines*, 658 F.Supp.2d 276 (D. Mass. 2009) ("caselaw interpreting provisions of the Warsaw Convention applies to cases interpreting 'substantively similar' provisions of the Convention"); *Wea Farms v. American Airlines*, 2007 WL 1173077 *3 (S.D. Fla. 2007); *Baah v. Virgin Atlantic Airways*, 473 F.Supp.2d 591, 592-93 (S.D.N.Y. 2007) (interpreting Article 33(1) of the Montreal Convention consistent with interpretation of Article 33(4) of the Warsaw Convention); *Igwe v. Northwest Airlines*, 2007 WL 43811 *3 (S.D. Tex. 2007). The Warsaw Convention and the Montreal Convention have even been construed as *collectively* governing air travel. *Nobre v. American Airlines*, 2009 WL 5125976 (S.D. Fla. 2009). Despite the potential persuasive value of the Warsaw Convention cases, neither the Respondent nor the Circuit Court afford any regard to *Hosaka*, and instead disregard the relevant forum selection langiage which existed in the Warsaw Convention which was carried over into the Montreal Convention.

Since neither Article 28(2) of the Warsaw Convention nor Article 33(4) of the Montreal Convention make any reference to the availability of the "doctrine of forum non conveniens", and since the treaty language which the United States delegates proposed was never incorporated into the Montreal Convention, the Eleventh Circuit's decision continues to conflict with the Ninth Circuit over the proper interpretation of the at-issue, identical language found in the modernized version of this treaty. *Compare Latimer v. U.S.*, 223 U.S. 501 (1912) (Identical language in re-enacted statute given same meaning). When the

District Court interpreted the Montreal Convention as maintaining the *status quo* (App. at 82), and the *status quo* was the subject of an unsettled dispute, this conflict will continue to exist until it is resolved by this Court.

IV. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PROHIBITION ON RESOLVING THE MERITS BEFORE RESOLVING THE PRELIMINARY ISSUES OF JURISDICTION AND VENUE

Petitioners do not dispute that pursuant to *Sinochem v. Malaysia Int'l. Shipping*, 549 U.S. 422 (2007) and *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999), this Court allowed inferior Courts to resolve *FNC* challenges before establishing personal or subject matter jurisdiction in certain circumstances. What Respondents missed from *Sinochem* and *Ruhrgas* was that *FNC* is a threshold *venue* challenge which must be addressed before a Court entertains the merits of an action and before a litigant actively participates in or acts in some manner inconsistent with an intent to challenge venue. All that the District Court referred to Martinique was a trial on remaining damage issues. This alone reveals that the District Court addressed and resolved all other issues in the litigation but for damages. To then apply an *FNC* analysis which was limited to remaining damage issues no longer renders *FNC* a 'threshold venue challenge'. As to Respondents' stipulation to liability, they should not be able to litigate for a year until things look grim, stipulate to liability in the District Court, and then seek *FNC* dismissal as to the remaining damage issues. By stipulating

to liability in the District Court, Respondents accepted the District Court as the most adequate and convenient court to hear the merits of Petitioners' claims. Having done so, Respondents waived any remaining *FNC* venue challenge. *See: Manley v. Engram*, 755 F.2d 1463, 1468 (11th Cir. 1985). Respondents cannot on the one hand stipulate to the jurisdiction of a court while on the other hand, continue to challenge its' venue. Were this precedent to stand, American companies sued in their district where their home offices are maintained could simply litigate until their liability becomes indefensible, stipulate in the district court to liability and then challenge *FNC* so that they would get to export the damage determination to a foreign court. Respondents' argument that strict liability makes liability issues irrelevant is also misleading. Respondents argument would fail if Petitioners were required to prove an ordinary negligence action with liability and damage components. The fact that the Montreal Convention provides Petitioners with the additional protection of strict liability should not make it *easier* for Respondents to avoid responsibility for their actions by then seeking *FNC* dismissal to a foreign country by claiming that liability issues are irrelevant for *FNC* purposes.

CONCLUSION

Respondents urge this Court that there are no conflicts when there are conflicts that are ripe for adjudication, not only between Appellate Courts, but with prior decisions of this Court. For the foregoing reasons, the Petition for Writ of Certorari should be granted.

Respectfully submitted,

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Dated: May 21, 2010

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